TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 810.

I. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN,

APPELLANTS,

vs.

LOUIS STIX, J. L. SWARTZ, N. STIX, AND HENRY KUPPER, AS LOUIS STIX & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED OCTOBER 4, 1878.

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4 UNITED STATES OF AMERICA,
Western District of Tennessee.

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1877, at the United States court house, in the city of Memphis, in said district, on, to wit: the 9th day of Oct., A. D. 1877,, in the following cause, to-wit:

M. WOLF AND OTHERS, Plaintiffs,
vs.
LOUIS STIX AND OTHERS, Defendants. } No. 297. Equity.

5 Chancery court of Shelby county.

STATE OF TENNESSEE,
Shelby County, ss:

Pleas before the Honorable R. J. Morgan, Chancellor of the chancery court of Shelby county, held in the city of Memphis, and State and county aforesaid, and at the April term thereof, 1877.

Be it remembered that heretofore, to wit: May 26th, 1877, M. Wolf *et al.* filed their bill of complaint against Louis Stix *et al.* in the said court, in the words and figures following, viz:

7 In the chancery court.

To Hon. Robert J. Morgan, Chancellor:

M. Wolf, Elias Lowenstein, and Leon Helman, all citizens of Shelby county, Tennessee,
vs.
Louis Stix, J. L. Swartz, Nathan Stix, and Henry Kupper, partners as Louis Stix & Co., all citizens of Cincinnati, in the State of Ohio.

The plaintiffs state and show that on the 8th day of December, 1866, the defendants, Louis Stix & Co., filed in the chancery court of Memphis their original bill, to which thay made David Marks, Simon Pump, Jacob Marks, and Isaac D. Marks, late partners as Marks, Pump & Co., of Memphis, and S. Pump & Co., of Columbus, Georgia, and the plaintiff, M. Wolf,
8 defendants.

In the said bill they alleged that Marks, Pump & Co. were indebted to the plaintiffs for goods, wares, and merchandise sold in the sum of thirteen thousand nine hundred and nineteen dollars and ninety-three cents ($13,919.93,) of which sum eight thousand eight hundred and ninety-one dollars and ninety-six

cents ($8,891.96) was due, and the balance would mature in January, 1867; and also that the said Marks, Pump & Co. were indebted to the plaintiffs, as the holders for collection, having the legal title for that purpose in their three (3) promissory notes, one for sixteen hundred and twenty-three dollars and eighty-three cents ($1,623.83) due at four months from 27th July, 1866, one for fifteen hundred and sixty-two dollars and fifty-eight cents ($1,562.58,) due eight months from the said date, and one
9 for fifteen hundred and ninety-three dollars and twenty cents ($1,593.20,) due twelve months from the said date, which said three notes in equity belonged to Reindskoff, Bro. & Co., and as to them that the bill was brought for their use.

The bill then further alleged that on the 30th day of November, 1866, the said Marks, Pump & Co. made a fraudulent sale of their stock of goods and other property in their store in Memphis, and of their stock of goods in Georgia, to the plaintiff herein, M. Wolf, for the purpose of hindering, delaying, and defrauding their creditors.

The bill then prayed that the stock of goods in Memphis, and other property so conveyed by the said Marks, Pump & Co., to the plaintiff, Wolf, be attached, as well as any debt due from
10 the plaintiff, Wolf, to the said Mark, Pump & Co., and that the plaintiffs in the suit have a decree against Marks, Pump & Co. for their debt, and that the same be satisfied out of the property attached.

The bill also prayed for an injunction against the defendants thereto, enjoining and restraining them from making any disposition of the said goods and property, and the said Wolf from paying, and the said Marks, Pump & Co. from receiving and collecting or settling any debt due to them by him.

The said bill was sworn to by one Swartz, one of the firm of Louis Stix & Co., and a judge, upon consideration of the bill, ordered that the clerk and master of the said chancery court, upon the plaintiffs entering into bond, as required by law
11 in attachment cases, issue an attachment as prayed for, and upon their giving bond in the sum of ten thousand dollars, ($10,000,) that he issue the injunction prayed for.

The attachment and injunction bonds, respectively, were executed according to the requirement of the said fiat, and on the said 8th day of December, 1866, the said clerk and master did issue writs of attachment and injunction in accordance with the prayer of the bill.

In and by the said writ of attachment, the sheriff of Shelby county was commanded to attach the stock of goods, lease and fixtures of said David Marks, Simon Pump & Co., in their store in Memphis, on Maine street, between Washington and Poplar, and any other property of said Marks, Pump & Co., and also any debt that might be due from the said M. Wolf to the said

12 Marks, Pump & Co., being the same property described in the said bill, to satisfy the debt due the plaintiffs in the said suit by the said Marks, Pump & Co., and the costs of the suit, and such estate *unless replevied*, so as to secure that the same might be liable to further proceedings thereon to be had, &c.

The said writ of attachment on the same day came to the hands of the sheriff of Shelby county, and was executed by him by levying on and attaching the lease, fixtures, and stock of goods named in the writ, and which were therein set out, and by taking the same into his possession.

In and by the said injunction the said M. Wolf was commanded to desist and refrain from paying any debt due by him to the said Marks, Pump & Co., and the said Marks, Pump & Co. 13 were commanded to desist and refrain from collecting, assigning, or disposing of any debt due them, or either of them from the said M. Wolf.

The writ of injunction was executed on all the said parties on the day it was issued.

Afterwards, on the 18th day of December, 1866, on the motion of the said M. Wolf, it was by the order of the court referred to the clerk and master to take proof and report *instanter* the value of the property attached in the cause found in the hands and claimed by the said M. Wolf, to enable the court to fix the amount of the replevy bond to be given by the said Wolf in replevying the same.

The clerk and master thereupon took proof, and reported that the property attached was of the value of ten thousand dollars, ($10,000;) and afterwards, on the twenty-fourth (24th) day 14 of December, 1866, the said M. Wolf, as principal, and the plaintiffs, Elias Lowenstein and Leon Helman, as his sureties, entered into a bond for the purpose of replevying the said property so attached, payable to the said Louis Stix & Co., in the sum of twenty thousand dollars ($20,000,) conditioned that whereas in the said suit the said writ of attachment had been issued against the said Marks, Pump & Co. for $18,699.54, besides interest and costs, and had been levied upon a stock of goods and other property, as the property of the said Marks, Pump & Co., which were in the possession of the said M. Wolf, and had been and were claimed by him as his property, and the bond was given by him for the purpose of replevying the said stock of goods and other property attached, being altogether, as it 15 was agreed by the parties, of the value of ten thousand dollars ($10,000;) then, in the event the said M. Wolf should be cast in the said suit, and said stock of goods and other property should be found and decreed by the court to have been subject to the said attachment, and liable thereunder to the satisfaction of the debts of the complainants against Marks, Pump, & Co., then, and in that event, should said M. Wolf pay to the

complainants, as the court might order, and direct the said sum of ten thousand dollars ($10,000,) the value of the said stock of goods and other property, with interest thereon from the said date, the said bond would be void, otherwise it was to remain in full force and effect.

The said parties so composing the said firm of Marks, Pump & Co., made no defense to the said suit, but each of them
16 suffered the bill to be taken for confessed against them.

But pending the said suit, on the 19th day of December, 1868, the said Jacob Marks filed his voluntary petition in bankruptcy in the district court of the United States for the district of West Tennessee, under the act of Congress in that behalf provided, and such proceedings were had thereon that on the 11th day of June, 1869, he was formally discharged from all his probable debts and liabilities, including the debts aforesaid to the said Louis Stix & Co.

And on the 19th day of January, 1868, the said Simon Pump filed his like voluntary petition in bankruptcy in the same court, and such proceedings were had thereon that on the 30th day of June, 1868, he was discharged from all his debts and lia-
17 bilities, including the debts aforesaid to the plaintiffs in the said suit, Louis Stix & Co.

And on the 26th day of March, 1868, the said David Marks filed his like voluntary petition in bankruptcy in the same court, and such proceedings were had thereon that on the 28th day of August, 1868, he was discharged from all his debts and liabilities, including the debts aforesaid to the plaintiffs in the said suit, Louis Stix & Co.

And on the 19th day of December, 1868, the said Isaac D. Marks filed his like voluntary petition in bankruptcy in the same court, and such proceedings were had thereon that on the 11th day of June, 1869, he was discharged from all his debts and liabilities, including the debts aforesaid to the said Louis Stix & Co.

18 After so obtaining their said several discharges in bankruptcy, the said Jacob Marks, Simon Pump, Isaac D. Marks, and David Marks, by the leave of the court, severally filed formal pleas in the said suit, setting up and relying upon their said respective discharges in bar of the further prosecution of the said suit against them.

The said M. Wolf filed his answer to the said bill, and testimony was taken on both sides, and on the 13th day of December, 1872, the cause was heard before the Hon. Robert J. Morgan, chancellor of the first chancery court of Shelby county, and the court found and decreed that the said M. Wolf had not been guilty of any fraud on the said Louis Stix & Co., or the creditors of the said Marks, Pump & Co., in purchasing the said stock of goods and other property from them, and that he did not

19 purchase them for the purpose of aiding and assisting the said Marks, Pump & Co., in defrauding the said Louis Stix & Co., or any of their creditors; and that the said M. Wolf was not indebted to the said Marks, Pump & Co., for the said goods and other property, or in any way, when the said bill was filed, or at any time since, and that there was no ground on which the suit could be maintained against the said M. Wolf, or against any of the property attached in the cause or replevied by the said M. Wolf, and therefore ordered that the said suit be dismissed as to the said M. Wolf; that he go hence and recover of the said Louis Stix & Co., and their surety, on their cost bond all the costs of the cause. And it was further decreed and ordered that as all the defendants, members of the said firm of Marks, Pump & Co., had been discharged as bankrupts, and had relied upon their discharge in defense of said suit, the
20 suit be dismissed as to them, and that the said Lewis Stix & Co., and their sureties, on their cost bond pay all the costs of the cause.

Afterwards, on the 21st day of March, 1878, the Louis Stix & Co. prayed and obtained an appeal from the said decree to the supreme court of the State of Tennessee.

Afterwards, on the 28th day of April, 1877, at the April term, 1877, of the supreme court of Tennessee, sitting at Jackson, the said cause was heard on appeal, and it was decreed that the said decree of the chancery court be reversed, vacated and annulled; that the said Louis Stix & Co., in their own right, recover of the said Marks, Pump & Co., the sum of $22,480.68, and for the use of Rindksoff Bros. & Co., the further sum of $7,671.88, and all the costs of the cause; that the sale of the
21 said stock of goods, fixtures and other property so sold by the said Mark, Pump & Co., to M. Wolf, and attached in the said suit as aforesaid, be set aside and for naught held as to the said Louis Stix & Co's. said debts against the said Marks, Pump & Co., and that the said Louis Stix & Co., in their own right, and also for the use of Rindskoff Bros. & Co., recover of and from the said M. Wolf and the plaintiffs herein, *alias* Lowenstein, and B. Helman, his sureties in the replevy bond aforesaid, the sum of sixteen thousand and two hundred dollars, ($16,200.00,) the value of the property replevied, and interest thereon to the day of the decree for which execution might issue.

And it was further decreed that as the members of the said firm of Marks, Pump & Co. had since the filing of the bill in the said cause been discharged in bankruptcy no execution
22 was awarded against them for the plaintiff's recoveries, and that the costs of the cause in the supreme court and the court below be paid out of the said recovery of $16,200.00 against the said M. Wolf and his said sureties on the said replevy bond.

The plaintiffs further state and show that the plaintiff, M. Wolf, on the 5th day of January, 1874, and while the said suit was pending on appeal in the supreme court of the State of Tennessee, as aforesaid, filed in the district court of the United States for the district of West Tennessee his voluntary petition in bankruptcy, and therein included his assets and property, and his debts and liabilities; and among the debts and liabilities so included was the liability on the said replevy bond to the said Louis Stix & Co.; and such proceedings were afterwards had on the said
23 petition that by the order of the said district court the said M. Wolf was afterwards, on the 28th day of March, 1874, duly discharged from all the debts and liabilities existing against him on the said 5th day of January, 1874, and a certificate in due form of law, under the hand of the judge and the seal of the said district court, was granted him accordingly. A copy of the said certificate will be filed with and as a part of this bill and marked Exhibit A, and the original will be held and produced for the purposes of this cause as the court may order.

The plaintiffs are advised and submit that by virtue of the act of Congress, in that behalf, in force the filing by the said M. Wolf of his said petition in bankruptcy had the force and effect of staying and stopping the further proceedings in the suit in the supreme court, and of preventing the said Louis Stix & Co.
24 and their agents and attorneys from prosecuting the said suit to final judgment against the said M. Wolf until the question of his discharge had been determined.

And the plaintiffs are advised further and submit that the discharge so granted to the said M. Wolf released him from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy, including his liability on the said replevy bond, or otherwise in the said suit to the said Louis Stix & Co., and made it unlawful for the said Louis Stix & Co. to proceed further in the suit, or to cause or procure judgment to be entered therein after the granting of the said discharge against the said M. Wolf.

And the plaintiffs Helman and Lowenstein are advised
25 and submit that their liability was only as the sureties of the said M. Wolf in the said replevy bond, and only according to the terms and conditions of the said bond, and was to become absolute and perfect only in the event that the said M. Wolf should be cast in the said suit, and as the proceedings in the said suit were stayed and stopped, as aforesaid, and became unlawful, and the said M. Wolf was so discharged from his liability on the said replevy bond and in the said suit, that the said judgment was rendered against the said M. Wolf and against them without the authority and in violation of the law, and is to all intents and purposes void and of no effect.

The plaintiffs state and show that for several years it has been

the established practice of the supreme court of Tennessee
26 not to receive a suggestion of the pendency of proceedings in bankruptcy from any party to a suit pending in the said supreme court, and not to entertain any motion, or application based upon such a suggestion, in any suit pending before it, and not to allow the filing in the said supreme court of a plea of discharge in bankruptcy by any party to a suit pending therein, and to take no notice of such discharge, but to proceed in the said suit and render judgment therein as if no such discharge had been granted.

The plaintiff, Wolf, did not know it was necessary to have his discharge in bankruptcy brought to the notice of the supreme court in the said suit of Louis Stix & Co. *vs.* Marks, Pump & Co., and so he did not call the attention of his attorneys, who were attending to the said cause in his behalf, to the fact that
27 he had such discharge, until he had heard that the supreme court had decided the said suit against him.

The said attorneys, as the plaintiffs are informed and believe, had no knowledge of the said discharge until they were informed thereof by the said Wolf, as above.

The plaintiffs, Lowenstein and Helman, had no information or knowledge that the said Wolf had obtained a discharge in bankruptcy, or had even filed the petition under which the said discharge was obtained, until they were informed of those facts after the said decision in the said cause had been rendered.

As soon as they had heard of the said decision in the supreme court in the said suit, the plaintiffs, Wolf and Lowenstein, caused a telegram to be sent to the clerk of the supreme court at "Jackson," requesting him not to enter the judment or decree, in pursuance of the decision, until their attorneys could reach Jackson.

28 But though the telegram was sent a few hours after the decision was rendered, and the attorneys arrived at Jackson as soon as they could conveniently go there, which was the Monday following the decision, Sunday only intervening, they found the judgment or decree already entered, and a copy thereof made and certified for the said Louis Stix & Co., for registration in Shelby county, where the same very soon afterwards was registered.

The object of the plaintiffs in requesting the withholding of the judgment or decree was to present the discharge in bankruptcy of the said Wolf to the court *before* the entry of the same, and to have the court pass upon the effect of the said discharge in the said suit, and upon the liability of the plaintiffs therein, in view of such discharge.

Thereupon, on the 3d day of May, 1877, the plaintiffs filed their petition, duly verified by affidavits, exhibiting the
29 original certificate of discharge of the said M. Wolf along

with it to the court, and therein set out the facts relied upon, and prayed the supreme court would allow their petition to be filed as and become a part of the record of the said suit, and would consider the said discharge in bankruptcy of the said M. Wolf, and by its decree would give it such operation and effect as the same ought by law to have as well in behalf of the said Elias Lowenstein and L. Helman, his sureties, as in behalf of the said M. Wolf; or, if the court was of opinion that the relief just asked was not proper, then that no final decree might be entered by the supreme court in the cause, but the same might be remanded to this court for further proceedings, with proper directions to effectuate the rights of the plaintiffs under the said discharge, and such other directions as might be deemed proper.

30 The court took the said petition into consideration, and on the 12th day of May, 1877, decided and ordered that the discharge in bnkruptcy of the said M. Wolf could not be set up in the supreme court, as it was a new defense, and that the petition and motion thereupon be overruled and dismissed. And so the plaintiffs, notwithstanding the absence of a good ground for holding them, or any, or either of them, liable on the said replevy bond, or in any other way, as has herein been shown, have the decree against them in favor of the said Louis Stix & Co., before mentioned, standing in full force, and their only adequate means of obtaining relief against the same is through this honorable Court.

31 If deemed necessary, the plaintiffs will file with, and as parts of this, their bill, copies of the said decree of the said supreme court, and of the said subsequent order, to be marked Exhibit B, and copies of the said petition of the plaintiffs, and of the affidavits filed in support thereof, to be marked Exhibit C. In consideration of the premises, the plaintiffs pray that the parties named as such in the caption may be made defendants hereto, and may be brought in by proper process or publication, and may answer this bill, but not under oath, as their oaths to their answers respectively are hereby respectfully waived. That a writ of injunction may issue enjoining and restraining the plaintiffs and their agents and attorneys from taking out execution upon, or otherwise attempting to enforce or collect, the said judgment or decree, so rendered by the said supreme court in favor of the said Louis Stix & Co., and against the plain-

32 tiffs, or any part or portion thereof, from the plaintiffs, or either of them, or such of them as may comply with the requirements of the fiat awarding such injunction, until the further order of the court. That on the final hearing the said injunction may be made perpetual; that the said judgment or decree of the supreme court may be decreed to be satisfied, and of no force or effect; that the plaintiff, M. Wolf, and the other

plaintiffs, may have the full benefit of his said discharge in bankruptcy; and that they may have all other proper relief.

The plaintiffs respectively pray that each may be allowed, if he elects to do so, to give a separate bond for injunction for himself, and to obtain a writ of injunction only on his own behalf, and that the fiat of the chancellor may be so worded as to give him that privilege.

This is the first application for a writ of injunction in the premises.

33 CHAS. KORTRECHT,
HENRY CRAFT, and
RANDOLPH, HAMMOND & WASSALL,
Sols. for Piff's

STATE OF TENNESSEE, }
COUNTY OF SHELBY, } *ss:*

Personally appeared before Edmund A. Cole, clerk and master of the chancery court of Shelby County, Elias Lowenstein and M. Wolf, who made oath in due form of law that the statements made in the foregoing bill as of their own knowledge are true, and those made upon information they believe to be true.

E. LOWENSTEIN.
M. WOLF.

Sworn to and subscribed before me, this 18th day of May, 1877.

R. J. BLACK,
D. Clerk and Master.

34 *Exhibit A.*

UNITED STATES OF AMERICA.

District court of the United States, western district of Tennessee.

Whereas, M. Wolf, of Selby county, Tennessee, has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said M. Wolf be forever discharged from all debts and claims which by said act are made provable against his estate and which existed on the 5th day of January, 1874, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

35 Given under my hand and the seal of the court at Memphis, in said district, this 28th day of March, A. D. 1874.

[SEAL.] (Signed) CONALLY F. TRIGG.

36 *Cost Bond.*

We, Elias Lowenstein et al. and surety, B. Lowenstein, acknowledge ourselves indebted to Louis Stix et al. in the sum of two

hundred and fifty dollars, to be void if the said Elias Lowenstein et al., complain in a bill which has this day been filed in the chancery court of Shelby county, against the said Louis Stix et al., shall pay all such costs as may be awarded against them by the court in its decrees and orders in said cause.

This 26th day of May, 1877.

BERNARD LOWENSTEIN.

Endorsed: Filed 26th day of May, 1877. E. A. Cole, C and M. *Nolopy.* Chas. Kortrecht, H. Craft, Randolph, H. & W., sols. for plffs.

38 *Exhibit B.*

The State of Tennessee.

Pleas before the supreme court of said State for the western division thereof, at Jackson, on the first Monday of April, A. D. 1877. Present: The Hon. James W. Dederick, Chief Justice, and Robert McFarland, John L. S. Sneed, Thomas J. Freeman, and Peter Turney, Associate Judges. To wit: Saturday, April 28th, 1877.

LOUIS STIX, NATHAN STIX, AND HENRY KUFFER, partners under firm name and style of Louis Stix & Co.,
vs.
DAVID MARKS, SIMON PUMP, ISAAC D. MARKS, and Jacob Marks, firm of Marks, Pump & Co., and M. Wolf.
} No. 246. Shelby Chy. Docket.

39 This cause was heard upon the transcript of the record from the first chancery court of Shelby county, and, after argument by counsel and full consideration by the court, this court is of opinion that there is manifest error therein, and doth therefore order, adjudge, and decree that the decree of said chancery court be reversed, vacated, and annulled.

And this court being further of opinion that the pretended sale of the stock of goods, fixtures, &c., referred to in complainant's bill made by defendants to Marks, Pump & Co., to the defendant, M. Wolf, was intended to hinder and delay their creditors, and was, and is, fraudulent and void as to the claims of the complainants. And it appearing from simple calcula-

40 tion that the said defendants, Marks, Pump & Co., are indebted to the complainants, Louis Stix & Co., in their own right, principal and interest, to this date, the sum of $22,480.68, and that the indebtedness of said Marks, Pump & Co. to Reinskolf, Bros. & Co., for whose use the said complainants, Louis Stix & Co., also filed this bill, amounts, principal and interest, at this date to the sum of $7,671.88. It is therefore ordered, ad-

judged, and decreed by the court that said complainants, Louis Stix & Co., in their own right, recover of said defendants, Marks, Pump & Co., said sum of $22,480.68, and that said complainants, Louis Stix & Co., for the use of Reinskoff Bros. & Co., recover of said defendants, Marks, Pump & Co., the said further sum of $7,671.88, and also the costs of this cause. And it further appearing to the court that the stock of goods, fixtures, &c., so fraudulently attempted to be sold to defendant, M. Wolf, and which were attached in this cause, were by said M. Wolf,
41 on the 24th day of December, 1866, replevied and taken possession of under a certain bond executed and filed in this cause on said day, in the sum of twenty thousand dollars ($20,000) by said M. Wolf as principal, with Elias Lowenstein and L. Helman as his sureties, conditioned in the event that said stock of goode, fixtures, &c., should be decreed to be subject to said attachment, and liable thereunder to the satisfaction of the debts of the complainants against Marks, Pump & Co., for the payments of the sum of ten thousand dollars, the agreed value of said goods, fixtures, &c., with interest thereon from said 24th day of December, 1866, the date of said bond. And this court being of opinion, as before recited, that said sale was fraudulent and void, and that said stock of goods, fixtures, &c., so attached and replevied, were subject to said attachment, and liable for the payment of complainants' said debts. And it further
42 appearing from simple calculation that said sum of ten thousand dollars, ($10,000,) with interest from the date of said bond, December 24th, 1866, to the present time, amounts to the sum of $16,200.00. It is therefore further ordered, adjudged, and decreed by the court that said fraudulent sale be, and hereby is, set aside and for naught held, as to complainants' said debts herein against defendants, Marks, Pump & Co., and that the complainants, Louis Stix & Co., in their own right, and also for the use and benefit of Reinskoff Bros. & Co., do have and recover of and from the defendant, M. Wolf, and of said Elias Lowenstein and L. Helman, his sureties on the aforesaid replevin bond, the said sum of sixteen thousand two hundred dollars, ($16,200.00,) the value of the property replevied and interest thereon to this date, for which execution may issue.

And it appearing from the record that that the said defendants, Marks, Pump & Co., have been since the filing of
43 complainant's bill discharged in bankruptcy, no execution is awarded against them for complainant's recoveries herein, and the costs of this cause in this court and the court below will be paid out of the said recovery of $16,200 against defendant, M. Wolf, and his aforesaid sureties, on replevin bond.

And on Saturday, May 12th, 1877, the supreme court rendered the following further decree in this cause, to wit:

LOUIS STIX *et al.*
vs.
MARKS, PUMP & CO. *et al.* } 246. Shelby Chy. D.

The court having considered the petition of defendant, M. Wolf, and the affidavits in support thereof, viz: the affidavits of M. Wolf, E. Lowenstein, Charles Kortrecht, Henry Craft, and E. S. Hammond, heretofore filed in this cause, praying
44 that the said M. Wolf be allowed to set up his discharge in bankruptcy set out in said petition by the proper plea in this court, or else that the said cause be remanded to the chancery court of Shelby county to allow the said discharge to be then pleaded in bar of the cause of action set up in this suit, and the decree heretofore entered be vacated and set aside for that purpose; and being of opinion that no new defense can be made in this court, and that it is not allowable to set up the defense of bankruptcy by any proceedings here for that purpose, it is therefore ordered, adjudged, and decreed by the court that the said motion be, and the same is now, overruled and disallowed and the said petition dismissed, and that the said defendant pay the costs of this motion and petition as other costs of the cause are paid, for which let execution issue.

45 STATE OF TENNESSEE.

I, John H. Freeman, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the decrees pronounced by said court, at the April term, 1877, in the case of Louis Stix & Co. *et al.* against Marks, Pump & Co. *et al.*, as appears of record now on file in my office.

In the testimony whereof, I have hereunto set my hand and affixed the seal of the court, at the office in the city of Jackson, on this, the 15th day of May, A. D. 1877,
[SEAL] and of the independence of the United States the 101st year.

JOHN H. FREEMAN, *Cl'k.*

46 In the Supreme Court.

To the honorable judges.

LOUIS STIX & Co. and others,
vs.
MARKS, PUMP & Co. and others. }

The petition of M. Wolf and Elias Lowenstein and L. Helman all citizens of Memphis, Tennessee, respectfully shows:

That the said M. Wolf is one of the defendants of the above cause, and was the same who was the vendee of the stock of goods which the court has decided was fraudulently sold to him by the defendants, Marks, Pump & Co., on the 30th day of No-

vember, 1866, the said goods being the stock then contained in store, 180 Main street, Memphis, Tennessee.

That the said M. Wolf, on the 2nd day of December, 1866, and after the said stock of goods was attached in this suit, replevied the same under the provisions of the code in that
61 behalf, and in order to do so on the same day he executed a replevy bond, payable to the plaintiff's in the suit, in double the value of the property attached, conditioned according to law with the said Elias Lowenstein and L. Helman as his sureties all as will more fully appear by the record of the cause.

That the said M. Wolf is liable in this suit only because he so replevied the said goods and so executed the said replevy bond, and that the said Elias Lowenstein and Leon Helman were liable only as the sureties of said M. Wolf, and according to the condition of the said replevy bond, and not in any other way or to any other extent.

That the final decree of the court below was rendered on the 13th day of December, 1872, and fully discharged the said M. Wolf, and as a consequence the said Elias Lowenstein and L. Helman, as his sureties, from all liabilities on the said bond.
62 That after the said decree had so been rendered, and after the appeal had been taken therefrom, and while the cause was pending on appeal in this court, to wit: on the 5th day of January, 1874, the said M. Wolf, in accordance with the provisions of the act of Congress to establish a uniform system of bankruptcy throughout the United States, filed his voluntary petition for a discharge in bankruptcy and subsequently was adjudicated a bankrupt, and thereafter was granted a certificate of discharge from his debts and liabilities in the words following:

UNITED STATES OF AMERICA:

District Court of the United States, Western District of Tennessee.

Whereas M. Wolf, of Shelby county, Tennessee, has been duly adjudged a bankrupt, under the act of Congress establishing a uniform system of bankruptcy throughout the United
63 States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said M. Wolf be forever discharged from all debts and claims, which by said act are made provable against his estate, and which existed on the 5th day of January, 1874, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the asseration of a discharge in bankruptcy.

Given under my name and the seal at the court of Memphis in said district, this 28th day of March, A. D. 1874.

[L. S.] (Signed.) CONNALLY F. TRIGG.

64 Petitioners are advised that the effect of the said discharge was and is to release and absolve the said M. Wolf from all liability on, or in consequence of having signed the said replevy bond, and necessarily also to release and absolve the said Elias Lowenstein and L. Helman, as his sureties on the said bond from all liability as such sureties.

In consideration of the premises and for as much as the cause is heard *de novo* in this court, and petitioners by reason of the facts aforesaid, had no opportunity of availing themselves of the benefit of the said discharge in the court below, they pray that this court will now allow this petition to be filed as, and come a part of the record in this suit, and will consider the said discharge, and by its decree will give such operation and effect as the same ought by law to have as well in behalf of the said Elias Lowenstein and L. Helman, his sureties.

65 So, if the Court is of opinion, that what has just been asked for is not proper, then petitioners pray that no final decree may now be entered in this cause, and that the same may be remanded to the court below for further proceedings, with proper directions to effectuate the rights of petitioners under the said discharge, and such other directions as may be deemed proper.

KORTRECHT & CRAFT, and
RANDOLPH, HAMMOND & JORDAN,
For Petitioners.

SHELBY COUNTY, *ss:*

I, M. Wolf, one of the petitioners in the foregoing petition, do swear that the matters therein stated are true to the best of my knowledge, information and belief.

M. WOLF.

Subscribed and sworn to before me, this 28th April, 1877.
JOHN T. ELLIOTT,
J. P., Shelby County, Tenn.

66 Endorsed: Filed May 3d, 1877.
JNO. FREEMAN, *Clk.*

In the supreme court of Tennessee.

LOUIS STIX & CO., AND OTHERS,
vs.
MARKS, PUMP & CO.

I, M. Wolf, one of the defendants in the above cause, do swear that I obtained my discharge in bankruptcy, as appears by reference to the same, since the decree in the cause was rendered in the court below, and that the petition on which the same was granted was likewise filed since the said decree was rendered.

And I further swear that I did not inform either of my attorneys, Henry Craft or Wm. H. Randolph, of the fact that

67 I had a discharge in bankruptcy before the hearing of the cause at the present term in this court. Nor did I know, until informed of the fact by my attorneys since I heard the supreme court had decided the cause, that my discharge in bankruptcy could be introduced into the record of the cause, or was was of any importance in the decision of it, or would in any way affect my own liability or my sureties if brought before the court.

M. WOLF.

Subscribed and sworn to before me, this 30th day of April, 1877.

JOHN T. ELLIOTT,
J. P., Shelby Co., Tenn.

68 In the supreme court of Tennessee.

LOUIS STIX & Co.
vs.
MARKS, PUMP & Co.

I, Elias Lowenstein, one of the sureties of the defendant, M. Wolf, on his replevy bond in this cause, do swear that I did not know, nor had I ever heard, before the decision of this cause, that the said M. Wolf had his discharge in bankruptcy.

I knew he filed his petition in bankruptcy in 1868, and that a compromise was affected between him and his creditors, and the petition afterwards dismissed, as appears in the record in this cause.

But I did not know, and never heard, until after I heard the cause had been decided by this court, that the said M. Wolf, in January, 1874, and after the decree of the chancery court
69 in this cause, filed his petition for a discharge in bankruptcy, and afterwards obtained such discharge. The fact that such discharge exists, I learned only on Saturday evening last, and after the telegram announcing the decision had been received in Memphis.

E. LOWENSTEIN.

Subscribed and sworn to before me, this 30th day of April, 1877.

JOHN T. ELLIOTT,
J. P., Shelby County, Tennessee.

Endorsed: Filed May 3d, 1877.

JOHN H. FREEMAN, *Clk.*

70 In Supreme Court.

LOUIS STIX & Co., *et al.*,
vs.
MARKS, PUMP & Co., and M. WOLF, *et als.*

Charles Kortrecht and Henry Craft make oath that they were the sole and only counsel in this cause for the defendant, M.

Wolf, Messrs. Randolph, Hammond and Jordan, having been retained, and appearing only as counsel for Elias Lowenstein, the surety of said Wolf on replevin bond.

They further state that they had no knowledge that their client, M. Wolf, was a discharged bankrupt until the case had been argued and decided in this court, when, on informing their client, said Wolf, that the suit was decided against him,
71 he informed them that he had petitioned and obtained his discharge as a bankrupt, in 1874, pending the appeal in this cause to this court.

CHAS. KORTRECHT,
HENRY CRAFT.

Sworn to and subscribed, May 3d, 1877.

JOHN H. FREEMAN, *Clerk.*

Endorsed: Filed May 3d, 1877.

JOHN H. FREEMAN, *Clerk.*

72 In the supreme court.

LOUIS STIX & Co.
v.
MARKS, PUMP & Co.

E. S. Hammond, of counsel for defendants in this case, makes oath that on Saturday last, viz., April 28th, 1877, when counsel first learned the fact that defendant, M. Wolf, had been discharged in bankruptcy, and after information of the decision of this court had been received, at request of counsel in consultation, affiant telegraphed Jno. H. Freeman, clerk of this court, not to enter the decree until counsel came up to the court on Monday. Affiant is informed the decree was then already entered, or being entered, and when with other counsel they reached here on Monday the minutes were being signed containing the decree.
73 The petition now filed was thereupon withheld for consultation with Mr. Craft, who reached the court this day.

E. S. HAMMOND.

Sworn to and subscribed before me, 3d May, 1877.

JOHN H. FREEMAN, *Clk.*

THE STATE OF TENNESSEE.

I, John H. Freeman, clerk of the aupreme court of said State for the western division thereof, at Jackson, hereby certify that the foregoing is a full, true, and perfect copy of the petition and affidavits accompanying same filed in the case of Louis
74 Stix & Co. et al. against Marks, Pump & Co. et al., as the same appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court, at office in the city of Jackson, on this 15th

day of May, 1877, and of the independence of the United States the 101st year.

[SEAL.] JNO. H. FREEMAN, *Clk.*

Endorsed: Filed June 16th, 1877. E. A. Cole, C. and M.

75 *Demurrer.*

M. WOLF ET AL.
vs.
LOUIS STIX & CO. ET AL. } No. 2615.

1st. It appears that the liability fixed upon the complainants by the decree of the supreme court, which is complained of by the complainants, arose out of the fraud in fact of complainant Wolf, and his certificate of discharge in bankruptcy does not release him from such a liability, and as he is not released but remains liable, just as if he had not been discharged in bankruptcy, so his co-complainants remain liable.

2nd. The supreme court having declared M. Wolf liable, his sureties and co-complainants are liable, according to the
76 terms and conditions of the replevy bond.

3rd. The discharge of said Wolf would not have the effect of discharging his sureties on the replevy bond.

4th. The complainants, according to the allegations of the bill, even if the matters relied on constitute a good defense, have been guilty of such *laches* as to cut them off from relief, in a court of equity.

5th. It appears that the equity of the complainants to relief is derived through fraud, and a court of chancery never favorably entertains a party whose defense is tainted with fraud.

Wherefore the demurrants pray judgment, that the bill be dismissed.

GANTT, PATTERSON & LOWE,
Sols. for the Demurrants.

Endorsed: Filed Sept. 18, '77. E. A. Cole, C. & M.

77 In the chancery court.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN all citizens of Shelby County, Tennessee,
vs.
LOUIS STIX, J. L. SWARTZ, NATHAN STIX AND HENRY KUPPER, partners as Louis Stix & Co., all citizens of Cincinnati, in the State of Ohio.

Petitioners, M. Wolf, Elias Lowenstein and Leon Helman would respectfully state and show:

That they are plaintiffs in the above-styled cause, and are all citizens of the State of Tennessee, and that none of them are citizens of the State of Ohio.

That the defendants in the above-styled cause are all
78 citizens of the State of Ohio, and that none of them are citizens of the State of Tennessee.

That the subject-matter of controversy or amount in dispute is of a value exceeding five hundred dollars ($500.00) exclusive of the costs of the suit.

Wherefore, petitioners pray that the said cause may be moved for trial into the circuit court of the United States for the district of West Tennessee.

STATE OF TENNESSEE,
Shelby County:

We, M. Wolf, Elias Lowenstein, and Leon Helman, petitioners in the foregoing petition, do swear that the statements contained in the same are true to the best of our knowledge, information, and belief.

79 E. LOWENSTEIN.
M. WOLF.

Subscribed and sworn to before me, this 21st day of September, 1877.

R. J. BLACK,
D. C. and M.

M. Wolf sworn and sub. before me, Sept. 25th, 1877.
R. J. BLACK,
D. C. and M.

In the chancery court.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN
vs.
LOUIS STIX, J. L. SWARTZ, NATHAN STIX, AND HENRY KUPPER, partners as Louis Stix & Co.

Know all men by these presents the [that] we, M. Wolf, Elias Lowenstein, and Leon Helman, and —— surety, are held and firmly bound unto Louis Stix, J. L. Swartz, Nathan Stix, and Henry Kupper, partners as Louis Stix & Co., in the penal
80 sum of five hundred dollars, conditioned that whereas the said M. Wolf, Elias Lowenstein, and Leon Helman have filed their petition for the removal of the above cause to the circuit court of the United States for the district of West Tennessee.

Now should they, the said petitioners, on the first day of next session of the said U. S. circuit enter therein a copy of the record in the said suit and appear therein, and enter special bail, if special bail was originally requisite therein, and pay all costs that may be awarded by the said circuit court, if said circuit court shall hold that such suit was wrongfully or improperly removed

thereto, then this bond is to be void; otherwise it is to remain in full force and effect.

Witness our hands and seals the 21st day of September, 1877.

E. LOWENSTEIN. [SEAL.]
M. WOLF. [SEAL.]
L. HELMAN.
By RANDOLPH, HAMMOND & W., *Attys.* [SEAL.]
L. LOWENSTEIN, (surety.) [SEAL.]

L. Lowenstein, s'ty, is good on the above bond.

R. J. BLACK,
D. C. and M.

81 *Order for Removal.*

Ent. Oct. 1, 1877, M. B. 19, p. 218.

M. WOLF & OTHERS
vs.
LEWIS STIX AND OTHERS } 2615. R. D., chancery court.

In this cause it appearing that the plaintiffs have filed their petition to remove this cause to the United States circuit court for the district of West Tennessee, and have filed the bond required by the statute in that behalf, and that it is a proper case for removal, it is now ordered that the said bond be, and the same is hereby, approved, and the clerk will certify a transcript of the cause to the Federal court aforesaid.

82 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1877, at the United States court house, in the city of Memphis, in said district, on to wit: the 19th day of January, A. D. 1878, in the following cause, to wit:

M. WOLF, *alias* LOWENSTEIN, AND LEON HELMAN, Plaintiffs,
vs.
LOUIS STIX, NATHAN SCHWARTZ, HENRY KUPPER, Partners as LOUIS STIX & Co., Defendants, } No. 297. Equity.

The defendants and Messrs. Gantt, Patterson and Lowe, their solicitors of record, will take notice that on the 5th day of February, 1878, or so soon thereafter as the same can be heard, the plaintiffs will apply to Hon. John Baxter, circuit judge of the United States for this circuit, at the court room of the United

States, in the City of Memphis, or elsewhere, if Judge
83 Baxter shall then be elsewhere, for a writ of injunction in the above case, according to the prayer of the bill, when and where you may attend, if you see proper.

January 19, 1878.

KORTRECHT AND CRAFT, AND RANDOLPH, HAMMOND & WASSELL,
For Plaintiffs.

The marshal will serve this notice by a copy on the defendants, or, if they cannot be found, return that fact, and serve a copy on Mess. Gantt, Patterson and Lowe, their solicitors of record.

January 19, 1877.

KORTRECHT AND CRAFT, AND RANDOLPH, HAMMOND AND WASSELL,
For Plaintiffs.

Endorsed: No. 297. Eq. D. M. Wolf and others *vs.* Louis Stix and others. Notice of application for injunction.

84 MEMPHIS, TENN., *Jan'y* 19, 1878.

The within-named defendants being non-residents of this district, and I unable, after diligent search, to effect service upon them, or either of them, I served certified copy hereof personally on Geo. Gantt, of the firm of Gantt, Patterson & Lowe, attorneys of the record for the defendants herein.

M. J. WALDRON,
U. S. Marshal.

Serv.—2.00.
1 M., 0.06—$2.06.

By SAM. C. PAINE, *Dep.*

Ret'd and ent'd Jan. 21, 1878.

H. E. ANDREWS, *Clerk.*

KORTRECHT AND CRAFT, AND RANDOLPH, HAMMOND & WASSELL,
For Plaintiffs.

85 The answer of Lous Stix, J. L. Schwartz, Nathan Stix and Henry Kupper, partners, under the firm-name and stye of Louis Stix and Co., to the bill of M. Wolf and others, pending in the circuit court of the United States for the western district of Tennessee, against them, relying upon and reserving the several grounds and causes of demurrer set forth in their demurrer filed to said bill, and insisting upon the same, just as if this answer were not filed, respondents for answer to said bill admit that on the 8th day of December, 1866, they filed their original bill in the chancery court of Memphis against Marks, Pump & Co., M. Wolf, and M. H. Wolf, in which, among other things, they alleged that a large debt was due them from Marks, Pump & Co., amounting to $14,919.96, and that said Marks, Pump & Co., owed certain other parties a large sum, to wit, which

86 respondents owned and held for the purposes of collection.

That said Marks, Pump & Co. had, on the 30th of November, 1866, made a pretended and fraudulent sale of their stock of goods, &c., to defendant, M. Wolf, (one of the complainants in this bill,) for the pretended consideration of $16,801.03. That no part of said consideration was paid, the pretended sale being fraudulent, and for the purpose of hindering, delaying and defrauding the creditors of Marks, Pump & Co., and especially these respondents. That said goods were in the actual custody of said M. Wolf, the fraudulent vendee, and that the pretended sale embraced all the visible property of said Marks, Pump & Co., leaving nothing whatever for creditors. Said bill prayed for an attachment to attach said goods and for an injuction to restrain the defendants thereto from disposing of said goods, and that they be declared subject to the debts due respondents, and that

87 the pretended sale be declared void as to creditors, &c.

There was a prayer for general relief. But for a more particular statement of the allegations of said bill, and the prayer for specific and general relief, and the process issued under the same, respondents refer to a certified copy thereof, which is made an annex to this answer as exhibit No. 1. Respondents show further, answering, say, that on the day of December, 1866, they filed their amended bill in said cause, a copy of which is made a part of this answer as exhibit No. 2. It is true that the process of attachment issued in said cause was levied upon said goods, and that the sheriff took them into actual custody and had them in possession by virtue of said levy, on the 20th of December, 1866, when the complainant, M. Wolf, the pretended owner and bona fide purchaser of said goods, moved for and ob-

88 tained an order to the clerk to estimate their value, with the view of getting them released by giving a replevy bond according to the laws of the State of Tennessee. Proof was taken on said order and the goods reported by the clerk to be worth $10,000. The said order is made part of this answer as exhibit No. 3.

The report of the clerk thereon is made a part of this answer as exhibit No. 4.

The said goods being thus appraised, the complainant, M. Wolf, replevied them by giving his replevy bond, to stand in the place of and answer for said goods, with co-complainants, Elias Lowenstein and L. Helman, as his sureties. For the exact terms and conditions of said bonds respondents refer to a copy thereof, which is filed as part of this answer, marked as exhibit No. 5.

Respondents further answering say that complainant, Wolf,

89 answered said original and amended bills, denying all allegations of fraud, claiming to be owner of the goods as bona fide purchaser for value, and that he had paid the whole consideration in cash and owned the vendors nothing. Much

proof was taken, consisting chiefly of the defendants and those aiding and abetting them in the gross fraud upon creditors, which respondents was endeavoring to uncover and expose. The grossest fraud was proven upon the vendors, Marks, Pump & Co., and the facts were very strong as tending to show the guilty participation of complainant, M. Wolf, in the fraud of the vendors. But the chancellor was of opinion that the proof was not sufficient to connect complainant, Wolf, with the fraud, and dismissed the bill. A copy of the decree dismissing the bill is made a part of this answer as exhibit No. 6.

90 This decree was rendered in 1872, and in March, 1873, the cause was removed to the supreme court of Tennessee at Jackson, where it remained until the April term, 1877, when it was finally heard and a decree rendered reversing the decree below, declaring the sale to complainant, M. Wolf, fraudulent and void, and the goods subject to the satisfaction of respondent's demands, and said Wolf liable upon his replevy bond for the value of the goods, and his sureties also liable as the result of the decision. A copy of the decree pronounced in the cause is made a part of this answer as Exhibit No. 7. It is true that all the members of the firm of Marks, Pump & Co. were discharged as bankrupts in 1868. They were discharged without assets. Decrees discharging them were entered in the progress of the cause. They were utterly worthless. The only thing left of value

91 for creditors was complainant M. Wolf and the bonds he had given. He failed in 1868 or 1869, compounded with his creditors at about 30 cents on the dollar—failed to pay this; and again failed and was discharged as a bankrupt in 1874. It is true that he did not petition to be adjudged a bankrupt, and to be discharged as such until after the attachment came against him and others, on behalf of respondents, had been removed to the supreme court of Tennessee by appeal. It is true that his discharge in bankruptcy was not set up or relied upon until after the final decree in the supreme court. It is not true that his bondsmen and co-complainants, were ignorant of the fact of his discharge until after said decision was rendered. Complainants, Wolf and Lowenstein are and were, during the whole time of said litigation, brothers-in-law. They were merchants in the same city for much of

92 that time, their places of business being near to each other. They and the said Helman were of the same nationality, and all intimate and particular friends. It is incredible that M. Wolf's co-complainants should, under these circumstances, be ignorant of the fact that he had gone into bankruptcy; but he pleads ignorance for his own counsel, why not for himself? Respondents are advised that the law will hold his counsel and his co-defendants to a knowledge of all he knew. There was no diligence, but gross negligence in bringing forward the defense of

bankruptcy. Complainants were bound to know that it could not be relied on in the supreme court. They were bound to know that, if available at all, it was before final judgment in the supreme court. Their remedy was by bill in the state
93 court of chancery to stop the further prosecution of the bill of respondents, in order to prevent final judgment against complainant, Wolf, and thereby prevent liability from being fixed on his bondsmen or sureties, according to the strictest interpretation of the conditions of his bond in their favor. They had it in their power to prevent final judgment against said Wolf, in the manner named, if the discharge in bankruptcy was a good defense. They did not make it. They did not even suggest the bankruptcy of the complainant, Wolf. They slept upon their rights. They never moved at all, until after the final decree against them, and then instantly clamored for the release of all parties on this long neglected ground of defense. Respondents are advised that no matter what may now be the right of complainant, Wolf, to be discharged from said judgment,
94 his co-complainants have no such right. The contingency has arisen upon which their liability was fixed, complainant, Wolf, has been cast in that suit. The goods have been declared liable. To give them all they contend for, those were the very conditions of their liability, and they have happened. Equity will not now relieve them unless they show a cause where, by fraud, accident, or mistake, unmixed with neglect on their part, the former judgment was obtained against them. This they cannot do. Respondents further answering say that the pleadings, proof, and decree in said cause of respondents against Marks, Pump & Co. and others, show a grossly fraudulent claim or demand. That the forthcoming or replevy bond, and the decree have their origin in a gross fraud, in which the complainant, Wolf, was a participator. To relieve him from the decree
95 is to relieve him from a demand founded in fraud. Respondents are advised that the plea of discharge in bankruptcy is no answer to a debt, claim, or demand which flows out of a fraud. That the bond is a substitute for the goods. That it is liable as they were liable. That to release liability on it is to say practically that there was no fraud in the transaction out of which the litigation sprung, and which produced the litigation and the bond. Such a result would encourage fraud; would make a court of equity practically aid the fraudulent vendee in escaping from the merited responsibility of his misdeeds. All this it is proposed to work out on technical and artificial rules which sacrifice substance to form; give away the *body* to preserve the *shadow*. Respondents show that they have an execution on their decree and pray that they be allowed to collect it. They
96 show that the bill in this cause was filed in the State court of chancery, and that the chancellor of the State court refused

an injunction upon full argument, and his refusal is indorsed upon the bill. This was practically deciding that complainant's bill contained no equity. Respondents are advised that the supreme court of Tennessee heard no new defence in that court, and only considers those matters which the record shows as it comes from the inferior court. All allegations of the bill not already answered, are now met with or denied as being untrue. Having fully answered respondents, pray to be hence dismissed with their reasonable costs, &c.

GANTT, PATTERSON & LOWE,
Sol'rs for Respondents.

97 (Endorsed.) No. 297. Eq. D. Circuit court of the United States, western district of Tennessee. M. Wolf *et als. vs.* Louis Stix *et als.* Answer of L. Stix *et als.*

Filed Feb. 6, 1878.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY.

98 To the Hon. Wm. M. Smith, Chancellor, &c.

LOUIS STIX, J. L. SWARTZ, NATHAN STIX, AND HENRY KUPPER, firm of Louis Stix & Co., citizens of Ohio, Complainants,

vs.

DAVID MARKS, SIMON PUMP, —— MARKS AND —— Marks, firm of Marks, Pump & Co., of Memphis, Tenn., and S. Pump & Co., of Columbus, Georgia, the first two citizens of Shelby county, Tenn., and the latter two non-residents, and M. Wolf, a citizen of Shelby county, Tenn.

Complainants respectfully show your Honor that defts, Mark, Pump & Co., are indebted to them in the sum of $\$13,919\frac{93}{100}$. That said debt is for goods, wares, and mcdse., &c., sold them for their house in Memphis and their house in Georgia, $\$8,891\frac{94}{100}$ of said debt is now due, and the balance will mature in January, 1867. Besides this, complainants are the holders

99 for collection, having the legal title for that purpose, of the three promissory notes of said Marks, Pump & Co., for the respective sums of $\$1,623\frac{83}{100}$, $\$1,562\frac{58}{100}$, and $\$1,593\frac{21}{100}$, dated July 27th, 1866, and due respectively at four, eight, and twelve months from date. That said notes in equity are the property of Renskoff Bros. & Co.

And as to this part of the debt complainants sue for said Renskoff Bros. & Co.

Complainants now show that on the 30th of November, 1866, said Marks, Pump & Co. made a fraudulent sale of their stock of goods in their store in Memphis, and of their stock of goods in Georgia. Said pretended sale, so far at least as to the Memphis

stock of goods, is reduced to writing, and pretends to be for the sum of $1,681\frac{3}{100}$, paid in cash. The sale also includes lease and fixtures, and the bill of sale is registered.

100 The stock of goods in Georgia was worth more than that in Memphis, as complainants are informed, and the two must be worth between twenty-five and thirty thousand dollars. One story told by defendants is that the sale was for cash in hand, and so the bill of sale recites, as to the Memphis stock; and the other story is that is was for the purpose of securing M. H. Wolf in certain endorsements for Marks, Pump and Co., which it is alleged he is bound on for them. Letters of recent date to complainants from Marks, Bump & Co. promise payment, and speak of their business in a way—taken in connection with this pretended sale—to show that it is an effort to defraud their creditors. Complainants charge that said sale was made to hinder, delay, and defraud the creditors of said Marks, Pump & Co.

101 It is not even represented that said Wolf paid for the Georgia house, which he claims to own. If mistaken in the fact that this is a fraudulent sale, then complainants insist that said Wolf owes for said goods, and they desire to reach the amount due for their debt.

Said Wolf is related by marriage to some of the firm of Marks, Pump & Co.

The premises considered, complainants pray that said defts. be made such by copy and spa; that they appear and answer, &c.; but an answer under oath is waived; that an attachment issue attaching said stock of goods, fixtures, and lease, and also to attach anything that may be due from the said Wolf to the said Marks, Pump & Co. on any account.

That they have a decree for their claims and satisfaction of the same out of the property and effects attached.

102 That the debt due complainants be first paid, and then that due Renshoff Bros. & Co. be paid.

They pray also for an injunction to enjoin said defendants from making any disposition of said goods, and said Wolf from paying, or said Marks, Pump & Co. from receiving or collecting or selling any debt due them from said Wolf, and they pray for general relief. This is the first application for attachment and injunction in this case.

GANTT & WADDELL,
Sols. for Complainants.

Personally appeared before me, A. Alston, clerk, &c., J. L. Swartz, one of said complainants, and made oath that the facts stated in the foregoing bill are [true] to the best of his knowledge, information, and belief.

J. L. SWARTZ.

Sworn to and subscribed before me, Dec. 8, '66.

BENJ. COLMAN, *Dep. Clerk.*

103 To the clerk and master of the chancery court of Memphis:

Upon complainants entering into bond, as required by law in attachment cases, issue the attachment as prayed for, and upon the complainants giving bond in the sum of ten thousand dollars, you will issue the injunction prayed for.

Dec. 8, 1866.

THOS. G. SMITH,
Judge of Law Court of Memphis.

A true copy.

A. ALSTON, *C. and M.*

Endorsed: 1450. Louis Stix and Co. vs. Marks, Pump & Co. Copy of attachment and injunction bill, filed Dec. 8, '66; issued Dec. 13th, '66, A. Alston, C. and M. Gant and Waddell, for complainants. Substituted for original bill by order of
104 court, Nov. 15, 1867, Gantt, H. D., 5537; final. Louis Stix and Co. vs. No. 1450, N. R. D., Marks, Pump & Co. Copy of att. and inj'n bill, filed 8th day of Dec'r, 1866. A. Alston, C. and M.; 5537; final. Gant and Waddell, sol's for complts.

105 To the Hon. Wm. M. Smith, Chancellor:

LEWIS STIX, NATHAN STIX, J. L. SWARTZ, HENRY KUPPER, firm of Lewis Stix and Co., of Ohio,
vs.
D. MARKS, S. PUMP, MARKS & MARKS, the latter two citizens of Georgia, and the former of Shelby county, Tennessee, and compose the firms of Marks, Pump and Co., and J. Pump & Co., and M. Wolf and M. H. Wolf and G. Kline, citizens of Shelby county, Tennessee, Defendants.

Complainants respectfully show your Honor that, for themselves and in behalf of Rindskoff, Bro. & Co., they filed their original attachment and injunction bill in this court against the above named defendants, except M. H. Wolf and G. Kline, alleging that Marks, Pump and Co. had made a fraudulent assignment of their stock of goods, lease and fixtures in Memphis, and of their stock of goods in Columbus, Georgia; that the
106 stocks of goods were worth from $25,000 to $30,000; that said M. Wolf pretended to give the sum of $16,800 for the stock of goods in Memphis in cash, taking a bill of sale for the same, which was registered; that this pretended sale was made on the — day of November, 1866. That the liabilities due from

said Marks, Pump & Co., and E. Pump & Co., to complainant, in their own right and for Rindskoff Bros. & Co., was upwards of $18,000. Attachment and injunction process has been issued, under said bill, and levied upon the gas fixtures and lease in Memphis, and served upon the defendants, M. Wolf and Marks and Pump. They now bring this amended bill, in order to make M. H. Wolf and G. Kline defendants, to reach the books, accounts and choses in action of Marks, Pump and Co., and for other purposes.

They show that said M. Wolf, as they are informed and believe, gave nothing whatever for either of said stocks of goods,
107 and does not pretend to have paid anything for the goods in Georgia, although he says he has sent his young men to take charge of it, and now has it in possession. Complainants are advised that they have the option to force the defendant, M. Wolf, to pay the value of the Georgia stock of goods or to pursue the goods themselves. They show that up to a very recent date said Marks, Pump & Co. were flourishing as merchants here and in Georgia, and writing letters of assurance to complainants that they would pay soon, but that they would not sacrifice their goods, and setting forth with much particularity the kindness of complainants to them, when without a word of warning their sign is taken down here and in Georgia. They seem to retire, and M. Wolf, related by marriage to one of them, and understanding their business, takes their place. He pretends to pay
108 every dollar cash for the goods in Memphis, and even takes a formal bill of sale and has it registered. The check for between sixteen and seventeen thousand dollars which he pretends to make the payment with is given to Marks, Pump & Co., and they transfer it to defendants, M. H. Wolf, and G. Kline. This check is now in the possession of M. Wolf, and exhibited by him to show that said pretended sale was valid. That M. H. Wolf is a brother of M. Wolf, and related by marriage to one of the house of Marks, Pump & Co.; that said check was transferred to M. H. Wolf and G. Kline to secure, as it is pretended, said M. Wolf against a liability of his as endorser for Marks, Pump & Co. of between three to eight thousand dollars; that the whole check, nearly $17,000, is transferred for this purpose; that said Marks, Pump & Co. made this pretended
109 transfer as a device to cover and conceal said fraudulent transaction, and the evidences of this fact is apparent on the face of the transaction. They give or pretend to give these terms the amount of cash necessary to indemnify said M. H. Wolf, and do this instead of paying off the debt on which they pretend he is bound, and holding the balance themselves as they would have a right to do.

That said Marks, Pump & Co. are making no efforts to pay and complainant, Swartz, has not even been able to get so see

either one of them. If this pretended sale were real, they would have a large amount of money, and, if honest, they could pay a large amount of complainants' debt. To show their pledges, and contrast them with their fraudulent conduct, complainants file, as part of this amended bill, two of their letters, marked Exhibits "A and B." Complainants show that
110 defendants, Marks, Pump & Co., seem to be as completely withdrawn from business as if they had never been merchants and business men; their kinsmen are stockholders for them. They have apparently retired without paying a dollar of their large liability, and in future hope, as complainants believe, to carry their business on in the name of another, and leave their debts wholly unpaid. Complainants show that said Marks, Pump & Co. have books, notes, bills, and other choses in action, including outstanding debts due them. They desire to reach these books, &c., and, if mistaken as to the character of said sales, then they are informed that the defendants, M. and M. H. Wolf and G. Kline, owe said Marks, Pump & Co. a large sum, which they desire to reach and subject to the payment of their debt, but which said defendants are concealing and covering up, to defeat the creditors of Marks, Pump & Co. in their
111 efforts to collect their debts, and that all of said defendants are conferring and confederating together for that purpose. Among other things, defendant, M. Wolf, represents that Marks, Pump & Co. have a large amount of cash; this complainants do not believe. He says that they could pay complainants the money coming to them if they wanted to.

The premises considered, complainants pray that said defendants be made parties by copy and spa and publication, that they appear and answer, &c., but an answer under oath is waived; that said defendant answer fully every allegation in this bill; that said M. Wolf answer and show what he gave for the stock of goods in Georgia, in what he paid for it, or how he is to pay for it, if he still owes for it, when the trade was made, where it was made, and every circumstance connected with it, whether
112 it was in writing or not, and if so who wrote it, and who mentioned it. The defendants will answer and show what M. H. Wolf and G. Kline gave for said draft; if they say it was to protect M. H. Wolf or M. H. Wolf and G. Kline, they will answer and show for what amount, and name the persons to whom the liability is due that is thus secured; they will answer where the money now is; they will answer what bonds, of accounts, notes, bills and other evidences of debt said Marks, Pump & Co. have; they will exhibit said check for said goods, with their answer, and state in whose custody it is at this time, and said defendants will produce said bonds, notes, bills and accounts. Complainants pray for an attachment to attach any debt that may be due on any account from defendants, M. H. Wolf and G.

Kline to Marks, Pump and Co. That an injunction issue to re
strain said parties from disposing of, paying out, or col-
118 lecting any monies, accounts, bills or notes in any way
connected with or growing out of said transactions, and that especially said Marks, Pump and Co. and said Wolf and Kline, if said sale was made bona fide and said money actually paid, that they, or such of them as may now have it, or any part of it, be enjoined from making any use or disposition of it, and required to hold the same subject to the orders of the court for the benefit of complainants' debt. That the parties having said money, or any part thereof, be enjoined, and particularly said Marks, Pump and Co., and said M. H. Wolf and G. Kline, who profess to have said money, be restrained by ne exeat from leaving the jurisdiction of the court until they produce the same and deliver it to the clerk and master of the court, or give satisfactory
bond to account for it, as the law directs. They pray for
114 general relief, and as in duty bound will every pray, &c.
This is the first application in this case for an attachment, injunction and ne exeat.

GANTT AND WADDELL,
Sols. for Complts.

Personally appeared before me, A. Alston, clerk, &c., J. L. Swartz, and made oath that the facts stated in the foregoing bill are true to the best of his knowledge, information and belief.

J. L. SWARTZ.

Sworn to and subscribed before me, Dec. 11th, 1869.

BENJ. COLMAN,
D. C. and M.

Upon bond, with security, being given in the sum of $5,000, conditioned as in section 4289 of the code of Tennessee, the clerk and master will issue the writs of attachments and injunction in
pursuance of the prayer of this bill, except that defendants
115 will not be restrained from disposing of money which may
have passed in the sale of the goods commanded to hold the same subject to the orders of the court; no exeat will issue.
Dec. 12th, 1866.

WM. M. SMITH,
Chancellor.

A copy: attest.

A. ALSTON, *C. and M.*

Endorsed: No. 1450, N. R. Louis Stix and Co. *vs.* Marks, Pump and Co. Copy of amended bill, filed Dec. 24, 1866; issued
Jan'y 2, 1867, A. Alston, C. and M. Substituted in lieu
116 of original, which was lost. Lewis Stix and Co. 1450 N.
A. D. *vs.* Marks, Pump and Co. *et als.*

In the above cause on the motion of defendant, M. Wolf, and it appearing that complainants' solicitors have had notice of this motion, it is ordered that it be referred to the clerk and master to take proof and report instanter the value of the property attached in the cause found in the hands of and claimed by defendant, M. Wolf, to enable the court to fix the amount of the replevy bond to be given by said Wolf in replevying the same.

Endorsed: No. 297. 1450. Circuit Court of the United States, Western District of Tennessee. Louis Stix *et als. vs.*
117 Marks, Pump and Co. Ent. Dec. 18, '66, in M. B., No. 3, page 493.

LOUIS STIX AND CO., *vs.* MARKS, PUMP AND CO. } Chancery Court of Memphis.

The clerk and master respectfully reports, in obedience to an order of reference herein, directing him to take proof and report the value of the goods attached in this cause; that he has taken the deposition of Nathan Greenwald touch[ing] the matter. From the proof thus taken, he finds and so reports, that said goods are worth ten thousand dollars, ($10,000.)

Respectfully submitted,

AUGUSTUS ALSTON,

C. and M. by Benj. Colman, D. C. & M., Dec. 29, 1866.

Endorsed: 1450. Louis Stix and Co. *vs.* Marks, Pump and Co. Report of C. and M., filed Dec. 29, 1866. A. Alston, C. and M.

118 We, M. Wolf, as principal, and Elias Lowenstein, and Leon Helman, security, as sureties, hereby bind ourselves unto Louis Stix and Co. in the sum of twenty thousand dollars.

The condition of the above bond is that whereas, in the suit now pending in the chancery court, at Memphis, in favor of said Louis Stix and Co., and against Marks, Pump and Co., and in which said M. Wolf is joined as a defendant, an attachment has been issued against said Marks, Pump and Co. for $18,699.54, besides interest and costs, and has been levied upon a stock of goods and other property as the property of said Marks, Pump & Co., which were in the possession of said M. Wolf, and were and are claimed by him as his property, and this bond is given by him for the purpose of replevying said stock of goods
119 and other property attached, being altogether, as it is agreed by the parties, of the value of ten thousand ($10,000) dollars. Now, in the event the said M. Wolf shall be cast in said suit, and said stock of goods and other property shall be found and decreed by the court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of complainants against Marks, Pump and Co., then and in that

event, should said Wolf pay to complainants, as the court may order and direct, the said sum of $10,000, the value of said stock of goods and other property, with interest thereon from this date, this bond will be void, otherwise to remain in full force and effect.

Witness our hands and seals, this —— day of December, 1866.

M. WOLF, [L. S.]
ELIAS LOWENSTEIN, [L. S.]
L. HELMAN. [L. S.]

120 Leon Helman, the surety on this bond, makes oath that he is worth $10,000 in property subject to execution.

L. HELMAN.

Subscribed and sworn to the 24th day of December, 1866.

BENJ. COLEMAN,
Dep. C. and M.

Endorsed: Filed December 24, 1866. A. Alston, *C. and M.*

121 The answer of M. Wolf to a bill of complaint filed by Lewis Stix & Co., and amended bill filed by same parties, in chancery court of Memphis, against him and others.

Respondent, reserving, &c., for answer to said original and amended bill, says that he has no personal knowledge and no information, which enables him to admit or deny the indebtedness of Marks, Pump & Co. to complainants, which is charged in said bill to exist; and he requires that the same be proved.

Respondent positively denies that on the 30th of November, 1866, or at any other time, "said Marks, Pump & Co. made a fraudulent sale of their stock of goods in Georgia" to this respondent. Respondent admits that he did purchase from Marks, Pump & Co. their said two stocks of goods; but he says that there was no fraud in the said purchases, but that, on the contrary,
122 they were made in good faith, without any intention or design on his part to hinder, delay, or defraud any one.

Respondent avers that so far as the said stock of goods in Georgia is concerned, the validity of his purchase has been tested by the said complainants, by an attachment suit instituted by them there, against Marks, Pump & Co., in which they claimed the goods so purchased by respondent to be attached, and that the said attachment suit has been decided against the said complainants.

For the said stock of goods in Memphis, respondent paid to the said Marks, Pump & Co., at the date of his purchase, in full payment therefor, the sum of $16,801.31 in cash, and took from them a bill of sale for said goods, which was duly registered in

the county of Shelby, and will be produced, and to the court shown, when necessary; and at the same time the said goods were delivered into the possession of respondent as the owner thereof.

123 The sum of money thus paid by respondent for the said goods was, as respondent avers, a full and fair price for the same, and quite as much as they were worth, at the time, in cash. The purchase was made, and the money paid by respondent, in good faith. The money which respondent paid was his own money, and it has not been in any way owned or held for his benefit. If there was any fraud or fraudulent design on the part of Marks, Pump & Co. in making said sale, or in the subsequent use of the money, respondent knew nothing of it, and was in no way a party to it.

Respondent also paid the said Marks, Pump & Co. in full for the stock of goods in Georgia, and took them into his possession as owner, and has continued to hold and own both the Georgia and Memphis stock; and is not now, in any manner or form, indebted to Marks, Pump & Co. on account of either stock of goods, or on any account.

124 Respondent has been informed, and believes, that the said Marks, Pump & Co. did pay to M. H. Wolf a part or the whole of the money received from him for the Memphis stock of goods; but this is a transaction of which respondent knows only by hearsay. The said M. H. Wolf is respondent's brother, but respondent is in no way concerned with him in his business affairs with Marks, Pump & Co. It has never been pretended, so far as respondent knows, that respondent's check, or the money paid on it, for the price of said Memphis stock of goods, was transferred to M. H. Wolf to secure this respondent in any way, as endorser for Marks, Pump & Co. Respondent has heard that it was to secure the said M. H. Wolf; as to the particulars of that transaction, respondent refers for information to the answer of M. H. Wolf in this cause, which gives the account which has been given to respondent, and the true

125 account so far as respondent knows. Respondent is not related to any of the firm of Marks, Pump & Co., nor is M. H. Wolf, except that the wife of the latter is the sister of S. Pump.

In answer to the special interrogations in reference to the Georgia stock of goods, respondent says that he sent a special agent to Columbus, Georgia, to examine the goods, with authority to make the purchase and draw on the Commercial Bank of Memphis for the money. And respondent says he did make the purchase for respondent, and the purchase money was fully paid to Marks, Pump & Co., and respondent does not now owe Marks, Pump & Co., and did not when his bill was filed, owe Marks, Pump & Co. anything whatsoever on any account.

And now, having fully answered, respondent prays to be hence dismissed, &c.

KORTRECHT & CRAFT,
M. WOLF. *Sols. for Respd't.*

126 Endorsed: 1450. Louis Stix & Co. *vs.* Marks, Pump & Co., and others. Answer of M. Wolf. Filed July, 18, '67. A. Alston, Com. Kortrecht & Craft, for Respd't.

127 LEWIS STIX AND OTHERS *vs.* MARKS, PUMP & CO., M. WOLF, M. H. WOLF, *et als.* } In the chancery court of Memphis.

The separate answer of defendant, M. H. Wolf, in the above stated cause.

This respondent, reserving the benefit of the usual exceptions to the said bill, for answer thereto says:

That in July, 1866, his co-defendants, Marks, Pump & Co., applied to him to aid them in their business in the way of procuring an extension of time upon indebtedness of the firm; and that, being willing to aid them, and for their accommodation, he executed and delivered to them, for the use and purpose aforesaid, his six promissory notes, of which a schedule, or descriptive list, is filed herewith, marked Exhibit A, as part of this answer; and, as part of the same arrangement, the said Marks, Pump & Co. made and delivered to respondent a conveyance, or bill of sale of their stock of goods, then in their store in Memphis, which was duly recorded in Shelby county, Tennessee.

128 This conveyance, or bill of sale, was absolute in its terms, but was intended and understood, between all the parties to it, as an indemnity or protection against the liability incurred by respondent upon the six promissory notes aforesaid. The title then acquired by respondent in and to the said stock of goods, respondent released and relinquished, by writing duly recorded in Shelby county, in consideration of the delivery to him, by said Marks, Pump & Co., of the check of M. Wolf for $16,801.31, as an indemnity instead of the said stock of goods aforesaid; and with the agreement that he should collect the money upon said check, and retain in his hands so much as would be necessary to pay off the six promissory notes, and use the same for the purpose, and pay the balance to Marks, Pump & Co. This check respondent collected at once, and, according to the agreement aforesaid, he retained, and now holds, the exact amount for which he is liable upon the said six promissory notes, and repaid to Marks, Pump & Co. at once, the balance being $4,000, or thereabouts.

129 This whole transaction took place, and the said balance was so paid over to Marks, Pump & Co., by respondent, before the service of the process in this cause upon respondent,

and before the institution of this suit; and respondent says that he has not now, nor did he have when made a party in this cause, nor at any time since, any money, property, or effects in his hands, or under his control, nor knew of any money, property, or effects in the hands or control of any other person, belonging to Marks, Pump & Co., or either of them. He holds the money received from Marks, Pump & Co., as aforesaid, to pay the six outstanding promissory notes so made by him. For the said notes he received no consideration whatever. He executed them solely for the accommodation of Marks, Pump & Co., and the money to pay them was placed in his hands as aforesaid, in good faith on his part, and is now held by him for the discharge of the notes and protection of himself from loss on account of them.

This transaction was wholly between respondent and
130 said Marks, Pump & Co. Respondent's partner, G. Klein, had nothing whatever to do with it. Respondent has been informed, and believes, that the six notes aforesaid, made by him for the accommodation of Marks, Pump & Co., were by them endorsed and transferred to their creditors—part of them to B. Simon & Co., and the others to Chappell, Bruce & Co., both of Cincinnati, Ohio, either in payment or as security for debts due them by said Marks, Pump & Co. The said B. Simon & Co., and Chappell, Bruce & Co., have notified respondent that the[y] hold the said notes, and have called upon him for payment of those which have fallen due. Respondent has not yet paid them anything except $100, paid before the filing of complainants' bill, not being willing to do so until he could be advised that he would be safe in so doing. The schedule filed as Exhibit A herewith shows which of the said promissory notes are claimed to be held by each of the said Cincinnati firms.

Respondent admits that he is the brother of M. Wolf, and
that his wife is the sister of Simon Pump, one of the firm
131 of Marks, Pump & Co., but he is not by marriage, or in any other way, otherwise related to any of the members of said firm. Respondent does not pretend that the said check was transferred to him to secure M. Wolf, as charged in the bill, nor in any way whatever; but on the contrary, denies that the transfer of it to him was connected with M. Wolf in any way. Respondent denies that he individually, or he and said Klein as partners, owe Marks, Pump & Co. a large sum of money, or any sum of money whatever; and he denies that he is concealing or covering up anything for said Marks, Pump & Co. to defeat their creditors, or otherwise, or that he is combining or confederating with any one for that purpose. Respondent knows nothing of the books of account, or of any notes, bills, or accounts, or other evidence of debt belonging to said Marks, Pump & Co.

And now having fully answered, respondent prays to be hence dismissed with his costs, &c.

132 And now, by way of petition or bill of interpleader, respondent, M. H. Wolf, would represent that the said B. Simon & Co., and Chappell, Bruce & Co., professing to hold the said six promissory notes so made by him for the accommodation of Marks, Pump & Co., are pressing for the payment of such of said notes as are now due, to the end that respondent may be directed in his action in the premises by the court, and protected from loss, he prays that the said B. Simon & Co. and Chappell, Bruce & Co. may be made parties to this cause, and required to show their claim and right to the said notes, and required to bring the said notes, as they mature, into this court for cancellation or delivery to this respondent, whenever he shall be required by the court to part with the money in his hands. This petitioner is ready, and here now proffers to pay the said notes as they mature, or, if so required by the court, to pay the amounts of them respectively, as they mature, into court, to be by the court disposed of upon such order being taken as will secure the cancellation of the notes, and their surrender to him.

133 Petitioner stands indifferent between the parties. He is not interested with nor in collusion with any of them, and submits himself to the protection of the court in the premises, and asks for such protection and relief as the court can afford.

KORTRECHT & CRAFT,
Sols. for Respdt.

THE STATE OF TENNESSEE,
Chancery Court of Memphis:

Before the undersigned, clerk of said court, this day personally appeared M. H. Wolf, the respondent in the foregoing answer, and made oath, in due form of law, that the statements in said answer contained are true, according to the best of his knowledge, information, and belief.

M. H. WOLF.

Sworn to and subscribed before me this 28th day of January, 1867.

R. J. BLACK,
D. C. and M.

134 *Exhibit A.*

List of notes made by M. H. Wolf to Marks, Pump & Co., and by them endorsed and transferred. All dated July 16, 1866.

1 at 6 mos., transferred to B. Simon & Co., Cin., for	$1,250 00
1 " 12 " " " " " " "	1,250 00
Total held by B. Simon & Co	2,500 00
1 at 6 mos., transferred to Chappell, Bruce & Co., Cincinnati, O., for $3,500, on which M. H. Wolf has paid $100, which with payments made by Marks, Pump & Co. reduced the note, leaving now due	2,146 78

1 at 12 mos., transferred to Chappell, Bruce & Co., for		4,000 00
1 " 18 " " " " " " "		2,000 00
1 " 2 years " " " " " "		2,245 22
Total held by Chappell, Bruce & Co		10,392 00
Add those held by B. Simou & Co		2,500 00
Amt. M. H. Wolf must pay		12,892 00
Add $100 he has paid		100 00
		12,992 00

Endorsed: 1450. Lewis Stix & Co. *vs.* Marks, Pump & Co. and M. Wolf and al. Answer and petition of M. H. Wolf. Filed May 16, 1867. A. Alston, Com.

135 LEWIS STIX AND CO. *et als.* *vs.* MARKS, PUMP AND CO., *et als.* } No. 1450. N. R. D.

This cause came on this day regularly for final hearing on the pleadings and proof, and the same having been read and the cause argued by counsel and fully considered by the court, it is of opinion and doth adjudge and decree that complainants have failed to show that defendant, M. Wolf, was guilty of any fraud on complainants or the creditors of defendants, Mark, Pump and Co., in purchasing the stock of goods from said Marks, Pump and Co. mentioned in the bill and attached in the cause, or that he purchased them for the purpose of aiding and assisting them in defrauding complainants or any of their creditors, or that said M. Wolf was indebted to said Marks, Pump and Co. for said goods or in any way when the bill herein
136 was filed, or at any time since, or that there is any ground on which the suit can be maintained against said M. Wolf, or against any of the property attached in the cause and replevied by said M. Wolf. It is therefore considered, ordered, and decreed by the court that this suit be dismissed as to said Wolf, and that he go hence and recover of complainants, and of Wm. Stix, D. H. Lindaner, and N. D. Menken, their surety on cost bond herein, his costs in this cause. And it further appearing that defendant, M. H. Wolf, has, by decree in this cause, been heretofore discharged from all liability on his plea and discharge in bankruptcy; and it appearing that all the other defendants have been discharged as bankrupts, and that their pleas in bankruptcy herein are true, it is further considered, ordered, and decreed that this cause be dismissed as to
137 all the defendants, and that complainants, and William Stix, D. H. Lindaner, and N. D. Menken, their sureties on the cost bonds herein, pay all the costs of this cause, for which let execution issue.

Endorsed: 1450. N. R. D. Lewis Stix and Co. *vs.* Marks, Pump and Co. Final decree. Ent. Dec. 13, '72. M. B. O. P., 319.

138 *Decree.*

This cause was heard upon the transcript of the record from the first chancery court of Shelby county, and after argument by counsel, and full consideration by the court, this court is of opinion that there is manifest error therein, and doth therefore order, adjudge, and decree that the decree of said chancery court be reversed, vacated, and annulled. And the court being further of opinion that the pretended sale of the stock of goods, fixtures, &c., referred to in complainants' bill, made by defendants, Marks, Pump and Co., to defendant, M. Wolf, was intended to hinder and delay their creditors, and was and is fraudulent and void as to the claims of the complainants. And it appearing from simple calculation that the said defendants, Marks, Pump and Co., are indebted to the complainants, Louis Stix and
139 Co., in their own right, principal and interest to this date, the sum of $22,480.68, and that the indebtedness of said Marks, Pump and Co. to Reinskoff Bros. and Co., for whose use the said complainants, Louis Stix and Co., also filed this bill, amounts, principal and interest at this date, to the sum of $7,671.88, it is therefore ordered, adjudged, and decreed by the court that said complainants, Louis Stix and Co., in their own right, recover of said defendants, Marks, Pump and Co., said sum of $22,480.68, and that said complainants, Louis Stix and Co., for the use of Reinskoff Bros and Co., recover of said defendants, Marks, Pump and Co., the said further sum of $7,671.88, and also the costs of this cause. And it further appearing to the court that the stock of goods, fixtures, &c., so frandulently attempted to be sold to defendant, M. Wolf,
140 and which were attached in this cause, were, by said M. Wolf, on the 24th day of December, 1866, replevied and taken possession of under a certain bond, executed and filed in this cause on said day, in the sum of twenty thousand dollars, by said M. Wolf, as principal, with Elias Lowenstein and L. Helman as his sureties, conditioned in the event that said stock of goods, fixtures, &c., should be decreed to be subject to said attachment, and liable thereunder to the satisfaction of the debts of the complainants against Marks, Pump and Co. for the payment of the sum of ten thousand dollars, the agreed value of said goods, fixtures, &c., with interest thereon from said 24th day of December, 1866, the date of said bond. And this court being of opinion, as before recited, that said sale was fraudulent and void, and that said stock of goods, fixtures, &c., so attached and replevied,
141 were subject to said attachment, and liable for the payment of complainants' said debt. And it further appear-

ing from simple calculation that said sum of ten thousand dollars, with interest from the date of said bond, December 24, 1866, to the present time, amounts to the sum of $16,200, it is therefore further ordered, adjudged, and decreed by the court that said fraudulent sale be, and hereby is, set aside and for naught held, as to complainants' said debts herein against defendants, Marks, Pump and Co., and that the complainants, Louis Stix and Co., in their own right, and also for the use and benefit of Reinskoff Bros. and Co., do have and recover of and from the defendant, M. Wolf, and of Elias Lowenstein and L. Helman, his sureties on the aforesaid replevin bond, the said sum of sixteen thou-
142 sand two hundred dollars ($16,200,) the value of the property replevied, and interest thereon to this date, for which execution may issue. And it appearing from the record that the said defendants, Marks, Pump and Co., have been, since the filing of complainants' bill, discharged in bankruptcy, no execution is awarded against them for complainants' recoveries herein, and the costs of this cause in this court and the court below will be paid out of the said recovery of $16,200 against defendant, M. Wolf, and his aforesaid sureties on replevin bond.

143 UNITED STATE OE AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1877, at the United States court house, in the city of Memphis, in said district, on, to wit: the 7th day of Feb., A. D. 1878, in the following cause, to-wit:

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN, Plaintiffs,
vs.
LOUIS STIX, J. L. SWARTZ, NATHAN STIX, and HENRY KUPPER, Partners as LOUIS STIX & Co., Defendants.
} No. 279. Equity.

The motion of the plaintiffs for the issuance of a writ of injunction in accordance with the prayer of the bill was this day heard, and after hearing the argument of the counsel of the parties the court orders, adjudges, and decrees that the said motion be sustained, and that a writ of injunction issue in accord-
ance with the prayer of the bill, enjoining and restraining
144 the defendants and their agents and attorneys from taking out execution upon or otherwise attempting to enforce or collect the judgment or decree rendered by the supreme court of the State of Tennessee for the western division, sitting at

Jackson, on the 28th day of April, 1877, in the suit of Louis Stix & Co. against Marks, Pump and Co. and others, whereby the said Louis Stix & Co. recovered of the plaintiffs herein, to wit, M. Wolf, and of Elias Lowenstein and Leon Helman, his sureties on the replevy bond, the sum of sixteen thousand two hundred dollars, ($16,200.00,) the value of the property replevied, and interest thereon to the date of the judgment or decree, until the further order of the court: *Provided*, the plaintiffs shall first give a bond, with good and sufficient security, to be approved by the court, payable to the defendants, in the penalty of thirty
145 thousand dollars, conditioned that the plaintiffs herein shall pay the amount of the said judgment or decree, with interest, damages, and costs, or shall perform the decree of the court in case the injunction is dissolved, and also shall pay all such damages as may be sustained by the wrongful suing out of the said injunction. And thereupon the plaintiffs execute and file the bond required, which is approved by the court, and the injunction ordered is issued; and the defendants being non-residents of the State of Tennessee, the injunction will be served upon their solicitors of record, and such service shall be deemed good as to them.

146 UNITED STATES OF AMERICA,
Western District of Tennessee.

The United States of America to the marshal for the western district of Tennessee, greeting: And the parties named below, as enjoined.

Whereas in a suit pending in court here, on the equity side, in which M. Wolf, Elias Lowenstein, and Leon Helman, plaintiffs, and Louis Stix & Co., composed of Louis Stix, J. L. Swartz, Nathan Stix, and Herny Kupper, are defendants, it has been ordered and decreed that a writ of injunction do issue in accordance with the prayer of the bill, provided the plaintiffs first give a bond, with good and sufficient security, to be approved of by the court, payable to the defendants, in the penalty of thirty thousand dollars, conditioned as presented in the said order and decree. And whereas the said bond has been given and
147 filed, and has been approved by the court, you are hereby commanded that you make known to the said Louis Stix, J. L. Swartz, Nathan Stix, and Henry Kupper, partners as Louis Stix & Co., and their agents and attorneys, that they have been and are hereby enjoined and restrained from taking out execution upon, or otherwise attempting to enforce or collect the judgment or decree rendered by the supreme court of the State of Tennessee for the western division, sitting at Jackson, on the 28th day of April, 1877, in the suit of Louis Stix & Co. against Marks, Pump & Co. and others, whereby the said Louis Stix &

Co. recovered of the plaintiffs herein, to wit: M. Wolf, Elias Lowenstein, and Leon Helman, his sureties on the replevy bond, the sum of sixteen thousand two hundred dollars,
148 ($16,200.00,) the value of the property replevied and interest thereon to the date of the judgment or decree, until the further order of the court here. And this they shall in no wise omit, under the pains and penalty prescribed by law. And do you make due return of the manner in which you have executed this writ.

Witness, Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the western district of Tennessee, this 7th day of February, A. D.
[SEAL.] 1878, and 102d year of American independence.

HORACE E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

Endorsed: No. 297 eq. Circuit court of the United
149 States, western district of Tennessee, M. Wolf and others vs. Louis Stix and others; writof injunction issued February 7th, 1878, H. E. Andrews, clerk; L. H. Pillsbury, D. C.; ret'd and filed Feb. 9, 1878. H. E. Andrews, clerk, by L. H. Pillsbury, D. C.

MEMPHIS, TENN., *Feb'y* 9, 1878.

The within-named defendants being non-residents, and not to be found in my district on said date, I served certified copy hereof personally on Geo. Gantt, of Messrs. Gantt, Patterson & Lowe, solicitors for the defendants therein named.

M. J. WALDRON,
U. S. M.
By A. J. GARNER, *Dep.*

Serv.—2.00.
1 M., 0.06—$2.06.

150 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1877, at the United States court house, in the city of Memphis, in said district, on, to wit: the 19th day of February, A. D. 1878, in the following cause, to wit:

M. WOLF, ELIAS LOWENSTEIN and LEON HELMAN, Plaintiffs,
vs.
LOUIS STIX, J. L. SWARTZ, NATHAN STIX and HENRY KUPPER, partners, as Louis Stix and Co., Defendants.
} No. 297, Equity.

This cause was this day heard on the bill and answer and the

exhibits thereto, and the replication to the answer and the stipulation of the parties in writing filed in the cause, and the evidence embraced in said stipulation, and it appearing to the court that the plaintiffs are not entitled to the relief prayed in the bill,
it is ordered that the bill be dismissed, and that the de-
151 fendants recover of the plaintiffs and their surety on the
cost bond all the costs herein expended, and that execution issue therefor.

And thereupon the plaintiffs pray an appeal from the said decree to the Supreme Court of the United States, to be held at Washington on the second Monday of October, 1878, and having executed an appeal bond in the penalty of twenty-eight thousand dollars, which is determined by the court to be an amount sufficient to cover the defendant's debt and damages and costs, conditioned according to law, with sureties, which bond and sureties are approved by the court as good and sufficient. Such appeal is hereby granted. And thereupon the defendants in open court acknowledge notice of the said appeal and waive the notice of a citation
and service thereof, and agree to appear and defend at the
152 return at the appeal as if a formal citation had been issued
and served.

153 UNITED STATES OF AMERICA,
Western District of Tennessee.

Personally appeared before me, L. H. Pillsbury, one of the commissioners of the circuit and district courts of the United States for said western district of Tennessee, Isaac Schwab, one of the sureties on the within bond, who, being by me first duly sworn, makes oath and says, that he is a resident of the district of West Tennessee, and is worth the sum of twenty-eight thousand dollars, in unencumbered property in his own name and right, over and above his legal debts and liabilities, and subject to execution under the laws of the State of Tennessee; that said property is situate in the county of Shelby, and State of Tennessee, and described as follows: stock of goods and personalty in the city of Memphis.

ISAAC SCHWAB.

Subscribed and sworn to before me, this 8th day of February, A. D. 1878.

L. H. PILLSBURY,
United States Commissioner for said Western District of Tennessee.

UNITED STATES OF AMERICA,
Western District of Tennessee:

Personally appeared before me, L. H. Pillsbury, one of the

commissioners of the circuit and district courts of the United States for said western district of Tennessee, Lazarus Lowenstein, one of the sureties on the within bond, who, being by me first duly sworn, makes oath and says that he is a resident of the district of West Tennessee, and is worth the sum of ten thousand dollars, in unemcumbered property, in his own name and right, over and above his legal debts and liabilities, and subject to execution under the laws of the State of Tennessee; that said property is situate in the county of Shelby, and State of Tennessee, and described as follows: stock of merchandise in Memphis, Tennessee, in western district of Tennessee.

LAZARUS LOWENSTEIN.

Subscribed and sworn to before me, this 8th day of February, A. D. 1878.

LEONARD H. PILLSBURY,
United States Commissioner for said Western District of Tennessee.

Equity Docket No. 297. Western district of Tennessee.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN,
vs.
LOUIS STIX, J. L. SWARTZ, NATHAN STIX, AND HENRY KUPPER, Partners as LOUIS STIX & Co.

Know all men by these presents, that we, M. Wolf, Elias Lowenstein, and Leon Helman, as principals, and Isaac Schwab, and Lazarus Lowenstein, as sureties, are held and firmly bound unto Louis Stix, J. L. Swartz, Nathan Stix, and Henry Kupper, partners as Louis Stix and Co. in the sum of twenty-eight thousand dollars, to be paid to the said Louis Stix and Co., their executors or administrators; to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, dated this 8th day of February, 1878.

Whereas the above-named M. Wolf, Elias Lowenstein, and Leon Helman, have prosecuted an appeal to the supreme court of the United States to reverse the judgment or decree rendered in the above-entitled suit in equity by the circuit court of the United States, for the western district of Tennessee.

Now, therefore, the considerstion of this obligation is such, that if the above-named M. Wolf, Elias Lowenstein, and Leon Helman, shall prosecute their said appeal to effect, and answer all costs and damages; if they shall fail to make good their plea,

then this obligation shall be void; otherwise to remain in full force and virtue.

M. WOLF, [SEAL.]
E. LOWENSTEIN. [SEAL.]
[SEAL.] LEON HELMAN,
By WM. M. RANDOLPH, [SEAL.]
His Attorney.
ISAAC SCHWAB. [SEAL.]
LAZARUS LOWENSTEIN.

Acknowledged and approved by and before me this 8th day of February, 1878.

H. E. ANDREWS, *Clerk.*
L. H. PILISBURG, *D. C.*

Endorsed: No. 279. Equity. Circuit court of the United States, western district of Tennessee. M. Wolf et als. *vs.* Louis Stix & Co. Appeal Bond. To United States Supreme Court. Filed the 8th day of Feb'y, A. D. 1878. H. E. Andrews, clerk. L. H. Pillsbury, D. C.

154 In the circuit court of the United States for the western district of Tennessee.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN
vs.
LOUIS STIX, NATHAN STIX, J. L. SWARTZ, AND HENRY KUPPER, partners as Louis Stix & Co.

The plaintiffs, for replication to the answer of the said defendants herein filed, say that the allegations, statements, and charges of their bill are true, certain, and sufficient, and that the answer of the said defendants, so far as it denies such allegations, statements, and charges, or is inconsistent therewith, is untrue, uncertain and insufficient, and this the plaintiffs are ready and willing to maintain and prove, according to the forms and practice of the court, or in such forms and modes as the court may prescribe.

HENRY CRAFT,
CHARLES KORTRECHT, and
155 RANDOLPH, HAMMOND & WASSELL,
For Plaintiffs.

Endorsed: No. 297. Eq. Circuit court of the United States western district of Tennessee. M. Wolf and others *vs.* Louis Stix and others. Replication to answer. Filed Feb. 6, 1878. H. E. Andrews, Clerk. L. H. Pillsbury, D. C.

156 M. WOLF, ELIAS LOWENSTEIN, AND L. HELMAN,
vs.
LOUIS STIX, J. L. SWARTZ, NATHAN STIX, AND HENRY KUPPER.
No. 297. In Equity.

Stipulation of Counsel.

1. It is agreed that copies of the orignal and amendatory bills of Louis Stix & Co., defendants in this cause, filed against Marks, Pump & Co. and M. Wolf, the complainant in this cause, and M. H. Wolfe, and the answers of the defendants thereto, are in evidence, and form part of the record. Copies of said bills are offered with the answers of defendants. Said bills and amended bill were filed, as appears by the endorsements on them, at Memphis, in the chancery court, in December, 1866.

2. It is agreed that a copy of the order made in the said cause of Louis Stix & Co. *vs.* Marks, Pump & Co. and others for the
157 ascertainment of the value of the stock of goods attached in said cause and the clerk's report in response to that order are in evidence in this cause, the said copies being Exhibits No. 3 and 4 to the answer of defendants in this cause. That a copy of the replevy bond given by complainants, Wolf, Lowenstein, and Helman, is in proof in this cause, a copy of said bond being Exhibit No. 5 to the answer of defendants in this cause.

3. It is admitted M. Wolf and M. H. Wolf answered, and denying the fraud charged in the bill of Louis Stix & Co. *vs.* them and Marks, Pump & Co., and copies of which are in proof, under stipulation No. 1. That in the progress of that cause all the members of the firm of Marks, Pump & Co., to wit: in the years 1868 and 1869, were discharged as bankrupts without assets, and that in 1868 the complainant, M. Wolf, applied to be discharged, but the application was withdrawn, and he compromised with his creditors. That complainant M. Wolf and complainant
158 Elias Lowenstein are brothers-in-law, and were in 1866, when said Lowenstein went upon the replevy bond offered in evidence and referred to in the bill and answer in this cause, that they have all the time resided in Memphis from 1866, and much of the time both been merchants (said Lowenstein all the time) in Memphis. That their places of business were near to each other; that they are of the same nationality and intimate, and that complainant Helman is of same nationality, and has ever since he went on said replevin bond resided in Memphis. That complainant M. Wolf was embarrassed in 1872, and [in] 1873 failed, and was discharged in bankruptcy on his own application made in United States district court at Memphis.
159 That he mentioned in his schedule the liability of the re-

plevin bond to Louis Stix & Co. mentioned above. Nothing was ever received by Louis Stix & Co. from his assets, and they did not prove any claim on the bankrupt court against him. It is admitted that much proof was taken on both sides in said cause on the subject of the alleged fraudulent conveyance by Marks, Pump & Co. to M. Wolf. That the chancellor was of opinion that the proof was insufficient to show that complainant, M. Wolf, participated in the fraud, rendered a decree on the ——— day ———, 1872, dismissing the bill, and that in March, 1873, it was carried by appeal to the supreme court at Jackson, Tenn. A copy of the decree of the chancellor is in evidence, the same being Exhibit No. 6, to the answer of defendants in this cause. It is admitted that the appeal was taken
160 to the supreme court of Tenn. from the said decree of the chancellor before the application of M. Wolf for discharge in bankruptcy. Said cause, owing to the crowded state of the docket, was not reached for trial in the supreme court at Jackson, Tenn., until the April term, 1877, at which term a decree was rendered in the same, reversing the decree of the chancellor, and finding and adjudging that the sale of said goods was a fraud upon creditors, and that the goods were subject to the debts of said Louis Stix & Co. against Marks, Pump & Co., and that said Wolf was liable for their value, and he and his sureties on the said replevin bond were liable, and decree was given fixing their liability. A copy of said decree is in evidence, marked Exhibit No. 7, to defendants' answer. It is further agreed
161 that the affidavits of M. Wolf, Elias Lowenstein, Leon Helman, Charles Kortrecht, E. S. Hammond and Henry Craft, made parts of the bill as exhibits thereto, shall be read and considered as evidence the same as if in the form of depositions, subject to objections for irrelevancy and incompetency. And the certified copies of the petitions of the plaintiffs herein to the supreme court of the State of Tennessee, and the orders of the supreme court made thereupon, exhibited with and annexed to the plaintiffs' bill, are also in evidence, as is also the discharge of the said M. Wolf as a bankrupt, exhibited with and made a part of the plaintiffs' bill.

The foregoing stipulations are entered into for the purpose of facilitating the disposition of the case, in the stead and place of formal proofs on behalf of the parties. And the cause is
162 now heard upon the record and such stipulations, and the evidence referred to upon bill and answer, and the exhibits thereto, and replication, in the same manner and with the like effect as if formal proofs were taken and filed, and the time allowed for that purpose had elapsed February 6, 1878.

GANTT, PATTERSON & LOWE,
Sols. for Defts.

HENRY CRAFT, and CHAS. KORTRECHT,
RANDOLPH, HAMMOND & WASSELL,
Sols. for Plaintiffs.

Endorsed: No. 297. Eq. Circuit court of the United States, western district of Tennessee. M. Wolf and others *vs.* Louis Stix and others. Stipulation as to evidence. Filed Feb. 6, 1878. H. E. Andrews, Clerk. L. H. Pillsbury, D. C.

163 UNITED STATES OF AMERICA,
Western District of Tennessee.

Personally appeared before me, L. H. Pillsbury, one of the commissioners of the circuit and district courts of the United States for said western district of Tennessee, A. L. Lowenstein, one of the sureties on the within bond, who, being by me first duly sworn, makes oath and says that he is a resident of the district of West Tennessee, and is worth the sum of twenty thousand dollars, in unencumbered in his own name and right, over and above his legal debts and liabilities, and subject to execution under the laws of the State of Tennessee; that said property is situate in Memphis, the county of Shelby, and State of Tennessee, and described as follows: stock of merchandise in Memphis.

A. L. LOWENSTEIN.

Subscribed and sworn to before me this 7th day of February, A. D., 1878.

L. H. PILLSBURY,
United States Commissioner for said Western District of Tennessee.

UNITED STATES OF AMERICA,
Western District of Tennessee.

Personally appeared before me, L. H. Pillsbury, one of the commissioners of the circuit and district courts of the United States for said western district of Tennessee, Elias Lowenstein, one of the sureties on the within bond, who, being by me first duly sworn, makes oath and says that Bernard Lowenstein is a resident of the district of West Tennessee, and is worth the sum of fifty thousand dollars, in unencumbered in his own name and right, over and above his legal debts and liabilities, and subject to execution under the laws of the State of Tennessee; that said property is situate in the county of Shelby, and State of Tennessee, and described as follows: Real estate and stock of merchandise in Memphis, Tennessee, and I make this affidavit because said B. Lowenstein is absent from the State.

ELIAS LOWENSTEIN.

Subscribed and sworn to before me this 7th day of February, A. D., 1878.

L. H. PILLSBURY,
United States Commissioner for said Western District of Tennessee.

Whereas, there is now pending in the circuit court of the

United States for the western district of Tennessee, in equity, a suit in which M. Wolf, Elias Lowenstein and Leon Helman are plaintiffs, and Louis Stix and others, constituting the firm of Louis Stix and Co., are defendants, praying, amongst other things, the allowance and issuance of a writ of injunction, as will more fully appear by reference to the bill in the said suit, now remaining of record in the said court, to which, for particularity and certainty reference is now here made. And whereas, also, the judge or court may, and probably will, require the plaintiffs, with one or more good and sufficient sureties, to execute a bond with certain prescribed conditions, as a condition for granting
164 the injunction prayed for. And whereas I am willing, and hereby agree to become and be the surety of the said plaintiffs on said bond, either singly or with others.

Now, to that end I hereby nominate, constitute and appoint, William M. Randolph and E. S. Hammond, or either of them, of Memphis, Tennessee, my true and lawful attorneys or attorney-in-fact, and authorize and empower them or either of them, in my name, place and stead, to execute, acknowledge and deliver, for me, such bond or bonds as the judge or court may require in the said suit as a condition of granting the said injunction, or otherwise, and thereby to bind and oblige me as fully and completely as the sole surety, or one of the several sureties on such bond, as I myself might do were I personally present and acting in that behalf.

And I hereby ratify and approve what my said attor-
165 neys or attorney may do in the premises, and agree to be bound by such bond or bonds as they or either of them may execute by virtue of the authority hereby granted, as fully as I could or might be if I executed the same in person.

Witness my hand this 26th January, 1878.

BERNARD LOWENSTEIN. [SEAL.]

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, Jno. Shea, deputy clerk of the county court of said county, Bernard Lowenstein, the within-named bargainer, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand, at office, this 26th day of January, A. D. 1878.

[L. S.] JNO. SHEA, *Deputy Clerk.*

Endorsed: No. 297, equity. Circuit court of the United States, western district of Tennessee. M. Wolf et al. vs. Rice, Stix and Co. Power of attorney from B. Lowenstein to W. M. Randolph.

Fees, 25c.; paid, Shea, C. Filed Feb. 7, 1878. H. E. Andrews, clerk; L. H. Pillsbury, D. C.

167 In the circuit court of the United States for the western district of Tennessee.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN
vs.
LOUIS STIX, J. L. SWARTZ, NATHAN STIX AND HENRY KUPPER, partners as Louis Stix & Co. } In Equity.

Know all men by these presents, that we, M. Wolf, Elias Lowenstein and Leon Helman, as principals, and A. L. Lowenstein and Bernard Lowenstein, as sureties, are firmly held and bound unto Louis Stix, J. L. Swartz, Nathan Stix and Henry Kupper, partners as Louis Stix & Co., in the penal sum of thirty thousand dollars ($30,000) lawful money of the United States, for the payment whereof, well and truly to be made, we and each of us bind ourselves and our respective heirs.

168 Signed and sealed this 7th day of February, 1878.

The condition of the above obligation is such that whereas in the above styled suit now pending in the circuit court of the United States for the western district of Tennessee, in equity, the court has ordered and decreed that upon the execution by the above-named obligors of a bond payable to the above-named obligees, with good and sufficient sureties to be approved of by the court in the above-named penalty, conditioned as is hereinafter specified, a writ of injunction issue, in accordance with the prayer of the bill in the said suit, enjoining and restraining the above-named defendants and their agents and attorneys from taking out execution upon or otherwise attempting to enforce or col-

169 lect the judgment or decree rendered by the Supreme Court of Tennessee for the western division, sitting at Jackson, on the 28th day of April, 1877, in the suit of Louis Stix & Co. against Marks, Pump & Co. and others, whereby the said Louis Stix & Co. recovered of the obligors herein, to wit, M. Wolf and Elias Lowenstein and Leon Helman, his sureties on the replevy bond, the sum of sixteen thousand two hundred dollars, ($16,200,) the value of the property replevied, and interest thereon to the date of the judgment or decree, until the further order of the court.

Now, should the said Wolf, Lowenstein and Helman, obligors herein, pay the amount of the said judgment or decree, so as to be enjoined, with interest, damages and costs, or shall perform the decree of the court, in case the injunction is dissolved,

170 and also shall pay all such damages as may be sustained by the wrongful suing out of the said injunction, then this bond shall be void; otherwise the same shall remain in full force.

And the obligors herein, including the sureties, do hereby consent and agree that in the event that the said injunction shall be dissolved, the same proceedings may be had upon this bond in the said circuit court of the United States as can be had in like cases upon injunction bonds in the chancery courts of the State of Tennessee under the present law and practice of said chancery courts, so that remedy by judgment or decree upon the said bond can be had in said circuit court of the United States, in the
171 above-styled cause, without remitting the obligees in this bond to a suit at law upon the same.

M. WOLF. [SEAL.]
E. LOWENSTEIN. [SEAL.]
LEON HELMAN, [SEAL.]
By W. M. RANDOLPH, [SEAL.]
Atty. for him.
A. L. LOWENSTEIN. [SEAL.]
BERNARD LOWENSTEIN, [SEAL.]
By WM. M. RANDOLPH, [SEAL.]
His attorney in fact.

Power of attorney filed herewith.

Approved February 7, 1878.

[L. S.] H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

Endorsed: No. 297. Equity. Circuit court of the United States, western district of Tennessee. M. Wolf and others *vs.* Louis Stix and others. Injunction bond. Filed Feb. 7, 1878. H. E. Andrews, clerk. L. H. Pillsbury, D. C.

UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee.

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect and correct copy of the original record and proceedings in said court as the same now appear of record and upon the files in my office, in the following cause, to wit: 297. M. Wolf et als. *vs.* Louis Stix et als.

In testimony whereof, I have hereunto set my name and affixed the seal of said court, at office in the city of Mem-
[SEAL.] phis, this 14th day of May, A. D. 1878, and of the Independence of the United States the 102d year.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

$43, transcript fee, paid by Lowenstein.

H. E. ANDREWS, *Clerk.*

(Endorsed on cover:) W. Tennessee C. C. U. S. No. 810. M. Wolf, Elias Lowenstein and Leon Helman, appellants, vs. Louis Stix, J. L. Swartz, N. Stix and Henry Kupper, as Louis Stix & Co. Filed 4th October, 1878.

In the Supreme Court

OF THE UNITED STATES,

OCTOBER TERM, 1878.

NO. 810.

M. WOLF, ELIAS LOWENSTEIN and LEON HELMAN,
APPELLANTS,

vs.

LOUIS STIX, J. L. SWARTZ, N. STIX and HENRY KUPFER, as LOUIS STIX & CO., APPELLEES.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF WEST TENNESSEE—IN EQUITY.

Pharr & Co., Printers, 285 Second St., Memphis

In the Supreme Court

OF THE UNITED STATES,

OCTOBER TERM, 1878.

NO. 810.

M. WOLF, ELIAS LOWENSTEIN and LEON HELMAN,
APPELLANTS,

vs.

LOUIS STIX, J. L. SWARTZ, N. STIX and HENRY KUPFER, as LOUIS STIX & CO., APPELLEES.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF WEST TENNESSEE—IN EQUITY.

Pharr & Co., Printers, 335 Second St., Memphis

In the Supreme Court

OF THE UNITED STATES,

OCTOBER TERM, 1878.

NO. 810.

M. WOLF, ELIAS LOWENSTEIN and LEON HELMAN,
APPELLANTS,
vs.
LOUIS STIX, J. L. SWARTZ, N. STIX and HENRY KUPFER, as LOUIS STIX & CO., APPELLEES.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF WEST TENNESSEE—IN EQUITY.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANTS.

The appellants were the plaintiffs below, and filed in the Chancery Court of Shelby county, Tennessee, their bill for relief against the appellees, who were the defendants, and subsequently, on the appearance of the defendants, removed the cause to the Circuit Court of the United States under the act of Congress of 3d March, 1875, 18 Statutes at Large, p. 470, on the ground that the plaintiffs were citizens of Tennessee, and the defendants were citizens of Ohio.

The state of facts appearing in the case is about as follows:

Marks, Pump & Co. were indebted to Louis Stix & Co. by notes for goods sold them.

They made a conveyance of a stock of goods they owned in Memphis, and other property, to M. Wolf.

Louis Stix & Co. then filed a bill in the Chancery Court of Shelby county, making Marks, Pump & Co. and M. Wolf parties as defendants. In the bill they claimed that Marks, Pump & Co. were indebted to them on the notes, but did not pretend M. Wolf owed them anything. They attacked the conveyance Marks, Pump & Co. had made to M. Wolf on the ground that it had been made to hinder, delay and defraud the creditors of Marks, Pump & Co., and caused a writ of attachment against the property of Marks, Pump & Co. to be sued out, and to be levied on the goods and other property which Marks, Pump & Co. had conveyed to M. Wolf, as the property of Marks, Pump & Co.

The prayer of the bill was that Louis Stix & Co. have a decree against Marks, Pump & Co. for the debt Marks, Pump & Co. owed them, and that the goods attached be sold to satisfy the decree.

Record, pp. 24–25, 26–29.

M. Wolf alone appeared and replevied the property attached, claiming to be the owner, and gave a replevy bond, with the plaintiffs in error, Lowenstein and Helman, as his sureties, payable to Louis Stix & Co., in the penalty of twenty thousand dollars, conditioned that in the event M. Wolf should be cast in the suit, and the stock of goods and other property should be found and decreed by the court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of Louis Stix & Co. against Marks, Pump & Co., then and in that event should M. Wolf pay to Louis Stix & Co., as the court might order and direct, the sum of ten thousand dollars, the value of the stock of goods and other property, with interest thereon from the date of the bond, the bond would be void, otherwise to remain in full force and effect.

Record, pp. 30–31.

Subsequently the cause was heard in the Chancery Court, and on the 13th day of December, 1872, the Chancellor decreed there was no fraud in the conveyance by Marks, Pump & Co. to M.

Wolf; that the property conveyed was the property of M. Wolf, and not liable to the attachment, and that the bill of Louis Stix & Co., as to M. Wolf, be dismissed.

Record, p. 36.

The members of the firm of Marks, Pump & Co. having, in the meantime, on their voluntary petitions, been discharged in bankruptcy, the bill as to them was at the same time dismissed.

From the decree so pronounced in the Chancery Court Louis Stix & Co., on the 21st March, 1873, appealed to the Supreme Court of Tennessee, where, at the April term, 1877, on the 28th of April, 1877, the decree of the Chancery Court was reversed, the conveyance by Marks, Pump & Co. to M. Wolf was declared to have been made by Marks, Pump & Co. to hinder, delay and defraud their creditors, and therefore to be void, and a decree was pronounced setting aside the conveyance as to Louis Stix & Co.'s debts against Marks, Pump & Co., and that Louis Stix & Co. recover of M. Wolf, and of Lowenstein and Helman, his sureties in the replevy bond, the sum of $16,200, the value of the property replevied, and interest thereon, and that execution issue.

Record, pp. 10–11, 37–38.

The court, in the same decree, then proceeded to order that no execution issue against the defendants; Marks, Pump & Co., on the decree, because, since the filing of the bill of Louis Stix & Co., they had been discharged in bankruptcy.

The Chancellor, as already stated, in the Chancery Court dismissed the bill of Louis Stix & Co. on the 13th day of December, 1872. Louis Stix & Co. obtained an appeal from that decree on the 21st of March, 1873, returnable to the April term, 1873 of the Supreme Court of Tennessee. The final decree in the cause was pronounced in the Supreme Court on the 28th of April, 1877. In the meantime, on the 5th day of January, 1874, and while the appeal of Louis Stix & Co. was pending in the Supreme Court, M. Wolf filed in the District Court of the United States for the District of West Tennessee his voluntary petition in bankruptcy, and therein embraced his assets and property and his debts and liabilities, including the liability aforesaid on the said replevy

bond to the said Louis Stix & Co. On the 28th of March, 1874, by the order of the said District Court, a certificate in due form of law was issued discharging the said M. Wolf from all the debts and liabilities existing against him on the 5th of January, 1874. And such certificate remains in full force.

Record, pp. 9–13.

On the 3d day of May, 1877, at the same term of the court, M. Wolf, Lowenstein and Helman, under the leave and order of the court, filed their petition in the Supreme Court, setting up the fact that M. Wolf's liability, and the liability of Lowenstein and Helman, arose solely by the execution by them of the replevy bond, in the manner already stated, and that all of them had been discharged on the final hearing, as before stated, by the decree of the Chancery Court dismissing the bill as to M. Wolf. Also, that on the 5th of January, 1874, after the decree of the Chancery Court had been rendered, and while the cause was pending on the appeal in the Supreme Court, M. Wolf, in accordance with the provisions of the act of Congress to establish a uniform system of bankruptcy throughout the United States, had filed in the District Court of the United States for the District of West Tennessee his voluntary petition in bankruptcy, and subsequently had been by the said court adjudged a bankrupt, and thereafter on the 28th of March, 1874, had been granted a certificate of discharge in due form of law from his debts and liabilities, which discharge the petition then proceeded to set out in words, and the petitioners produced in court. The petition claimed that the effect of M. Wolf's proceeding in bankruptcy, and of his discharge, was to release and discharge him and his sureties, Lowenstein and Helman, from liability by reason of having signed the replevy bond, and from any further proceeding against them to enforce any liability on the bond.

The petition prayed, forasmuch as the case was heard *de novo* in the Supreme Court, and the petitioners, by reason of the facts stated, had been afforded no opportunity of availing themselves of the benefit of the discharge of M. Wolf in the Chancery Court, that the court would then allow the petition to be filed and to become a part of the record in the suit, and would consider the discharge, and by its decree would give it such operation

and effect as it ought by law to have, as well in behalf of M. Wolf as in behalf of Lowenstein and Helman, his sureties.

Or, if the court was of opinion that the above prayer could not be granted, then that no final decree might then be entered in the cause, and that the cause might be remanded to the Chancery Court for further proceedings, with proper directions to effectuate the rights of the petitioners under M. Wolf's discharge, and such other directions as the court might deem proper.

Record, pp. 12–14.

Neither Lowenstein nor Helman were informed of Wolf's petition or discharge in bankruptcy until after they heard of the decision of the cause by the Supreme Court on the 28th of April, 1877. The counsel of Wolf managing the cause in his behalf in the Supreme Court were not informed of his petition or discharge in bankruptcy until after the decision of the cause by the Supreme Court.

Record, pp. 14-16.

M. Wolf did not communicate the fact of his petition or discharge in bankruptcy to his attorneys in the cause until after he had heard of the decision by the Supreme Court, and he was entirely ignorant of the fact that he could make his proceedings in bankruptcy, or discharge, available as a defense to himself or the sureties on his replevy bond in the Supreme Court.

Record, pp. 14-15.

On the 12th of May, 1877, as the record states, the Supreme Court having considered the petition of Wolf, Lowenstein and Helman, and the affidavits in support thereof, theretofore filed in the said cause, and being of opinion that no new defense could be made in the Supreme Court, and that it was not allowable to set up the defense of bankruptcy by any proceeding *there* for that purpose, ordered, adjudged and decreed that the said motion be and the same was overruled and disallowed, and that the said petition be dismissed, and that the defendants pay the costs of the motion as other costs of the cause were paid, for which execution would issue.

Record, p. 12.

On the 26th day of May, 1877, after the Supreme Court of Tennessee had dismissed their petition to be allowed the benefit of Wolf's discharge in bankruptcy Wolf, Lowenstein and Helman filed in the Chancery Court of Shelby county the present bill, stated therein substantially the facts hereinbefore stated, and others not necessary to be here recited, and prayed a writ of injunction enjoining the said Louis Stix & Co. from taking out execution upon or otherwise attempting to enforce or collect the said decree so rendered by the Supreme Court of Tennessee from the plaintiffs in the bill or either of them; that on the final hearing the injunction might be made perpetual; that the said decree of the Supreme Court might be decreed to be satisfied, and of no force or effect; that Wolf and the other plaintiffs might have the full benefit of his discharge in bankruptcy; and that they might have all other proper relief.

Record, pp. 1, 8-9.

After the Supreme Court of Tennessee had pronounced the two decrees already mentioned, that of 28th of April, 1877, reversing the decree of the Chancery Court of Shelby county and declaring the conveyance by Marks, Pump & Co. to M. Wolf to have been fraudulent as to the creditors of Marks, Pump & Co., and setting it aside as to Louis Stix & Co.'s debt as decreed to be due, and giving judgment against Wolf and Lowenstein and Helman on the replevy bond for the value of the goods, as therein stipulated, and interest, and the decree of 3d of May, 1877, overruling and dismissing the petition of Wolf, Lowenstein and Helman to be allowed to set up Wolf's discharge in bankruptcy in that court, or else that the cause might be remanded to the Chancery Court to allow the discharge to be there pleaded in bar of the cause of action, Wolf, Lowenstein and Helman sued out a writ of error from such decrees to this court. A motion to dismiss the writ of error for want of jurisdiction was sustained at the last term on the ground that the Supreme Court of Tennessee had not decided that the discharge in bankruptcy of Wolf was inoperative as a release of the obligation involved in the suit, but had decided only that the defense of a discharge in bankruptcy, *after the decree below*, could not be set up in the Supreme Court, *as no new defense could be made there.*

See Wolf vs. Stix, 96 U. S. (6 Otto), p. 543.

The Circuit Court of the United States, after the removal of the cause to it on the 7th of February, 1878, granted the injunction as prayed for in the bill, and it was issued and served.

Record, pp. 38-40.

This injunction was granted after the answer of Louis Stix & Co. had been filed, which was done on the 6th of February, 1878.

Record, pp. 20-24.

After the injunction had been granted the parties, with a view of facilitating the final hearing of the cause, entered into an agreed state of facts, to be used as and have the effect of formal proofs on the hearing on behalf of the respective parties.

Record, pp. 44-45.

This course was pursued at the suggestion of Hon. John Baxter, the Circuit Judge, who presided, because, as was then understood, neither party would be content with the decree the Circuit Court might render. Thereupon, the Judge, in order that the case might go to this court, proceeded to pronounce a formal decree, without an examination of the authorities, or any particular consideration of the case, reciting that the cause had been heard on the bill, the answer, the replication thereto, and the stipulation in writing of the parties filed in the cause, and the evidence embraced in the stipulation, and that the bill was dismissed because it appeared the plaintiffs were not entitled to the relief prayed.

Record, pp. 40-41.

Before the removal of the cause from the State Court Louis Stix & Co. filed a demurrer to the bill assigning grounds as follows:

1. It appears the liability fixed upon the plaintiffs in the bill of which they complain arose out of the fraud in fact of Wolf, and his certificate of discharge in bankruptcy does not release him from such liability; and as he is not released, the other plaintiffs, his sureties, are not released.

2. The Supreme Court of Tennessee having declared Wolf liable, the other plaintiffs, his sureties, are liable according to the terms and conditions of the replevy bond.

3. The discharge of Wolf would not have the effect of discharging his sureties on the replevy bond.

4. The plaintiffs in the bill have been guilty of such *laches* as to cut them off from relief in a court of equity.

5. The equity of the plaintiffs to relief is derived through fraud, and a Court of Chancery does not entertain favorably a defense tainted with fraud.

Record, p. 17.

No formal disposition seems to have been made of the demurrer, But the defendants reserve the benefit of it in their answer. And I can discover in the answer no fact material to the cause not substantially stated in the bill, and no contradiction of any material statement of the bill.

The argument and rhetoric of the answer, I take it, are out of place there, and deserve no notice here.

Record, pp. 20-24.

The agreed state of facts on which the cause was heard is but a repetition of the principal facts stated in the bill.

Record, pp. 44-45.

The court, therefore, is substantially to pass upon the case made by the bill as if upon demurrer.

ASSIGNMENT OF ERRORS.

1. The court below erred in dismissing the bill of the plaintiffs and in decreeing costs against them.

2. The court erred in not decreeing that the defendants were perpetually enjoined from taking out execution upon or otherwise attempting to enforce or collect the decree mentioned in the record, rendered by the Supreme Court of Tennessee in favor of the defendants against the plaintiffs; and in not decreeing the said decree of the said Supreme Court to be sat-

isfied and of no force or effect; and in not decreeing the plaintiffs the full benefit of the discharge of the plaintiff Wolf as against the said decree of the said Supreme Court, and in not granting the plaintiffs the relief the facts appearing in the record entitle them to.

I

The Liability of Wolf, Lowenstein and Helman to Louis Stix & Co. arose solely out of the replevy bond executed by them.

The court will notice that the decree pronounced against Wolf, Lowenstein and Helman by the Supreme Court of Tennessee is based exclusively on the fact that they had executed the replevy bond in order to replevy the goods attached, and is for the precise amount stipulated in the bond to be paid on the happening of the contingency therein recited, which amount, the decree proceeds to say, "appears from simple calculation."

Record, p. 11.

The answer of the defendants admits the decree of the Supreme Court of Tennessee declared Wolf liable *upon his replevy bond* for the value of the goods, and his sureties, Lowenstein and Helman, liable as the result of the decision, and makes an argument to show the decree *on the bond* was right and proper.

Record, pp. 22-23

The Code of Tennessee, applicable to cases where property has been attached, and afterwards replevied upon executing a replevy bond in the same suit, provides:

"Section 3514. The court may enter up judgment or decree upon the bond in the event of a recovery by the plaintiff, against the defendant and his sureties for the penalty of the bond, to be satisfied by the delivery of the property or its value, or payment of the recovery, as the case may be."

This section contains the only statutory provision for a decree in the same suit in which the bond is given against a party occupying the position Wolf did in the suit of Louis

Stix & Co. against Marks, Pump & Co., or against parties occupying the positions Lowenstein and Helman did, they being merely sureties on Wolf's replevy bond in that suit.

And it is not difficult to show, as a matter of law, that there was no liability and that there could have been no recovery by Louis Stix & Co. against Wolf, for anything that was alleged against him by the pleadings in the suit of Louis Stix & Co. vs. Marks, Pump & Co. had he not, after the goods had been attached under the writ of attachment issued in the suit, replevied them by executing the replevy bond. He was but the vendee of goods which the law, under the circumstances of the sale, declared had been sold by Marks, Pump & Co. for the purpose of hindering, delaying or defrauding their creditors, and had been bought by him with notice, express or implied, of such purpose.

In Adler vs. Fenton, 24 Howard, 410, this court decided that a creditor could not maintain an action against a fraudulent vendee, for taking a conveyance from his debtor made to hinder, delay or defraud creditors, and that such creditor's only right was to follow and subject to the payment of his debt the property fraudulently conveyed.

The conclusion of the court at the close of the opinion is in these words: "In the absence of special legislation we may safely affirm that a general creditor cannot bring an action on the case against his debtor, or against those combining or colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay and defraud creditors."

24 Howard, p. 413.

The statute of frauds making void conveyances made to hinder, delay or defraud creditors gives to the creditors only the right to treat the conveyance as a nullity, and the property as still the debtor's.

Code of Tennessee, sec. 1759.

See Chiles vs. Derrick, 1 Yerger, p. 79.

In Tennessee the law on this subject has been long settled. In Simpson vs. Simpson, 7 Humphreys, p. 275, it was held that the creditor could not recover from the fraudulent vendee *for the use* of the property fraudulently conveyed. In Tubb vs. Williams, 7 Humphreys, 367, 371-372, it was decided that *the proceeds* of the property fraudulently conveyed could not be recovered from the fraudulent vendee by creditors. In the later case of Richards vs. Ewing, 11 Humphreys, 327, the same proposition was decided, and Tubb vs. Williams was referred to as authority.

And see a statement of the law by Chancellor Cooper in Parker vs. Freeman, 2 Tennessee Chancery Reports, (Cooper), pp. 615–616.

The case of Phipps vs. Sedgwick, 95 U. S., (5 Otto), pp. 3, 8–10, I understand to be an authority in the same direction.

Other authorities are

Moran vs. Dawes, 1 Hopkins, Ch'y * p. 365.
Wellington vs. Small, 3 Cushing, 145.
Lamb vs. Stone, 11 Pickering, 527.

II

THE LIABILITY OF WOLF TO LOUIS STIX & CO. WAS PROVABLE IN BANKRUPTCY AGAINST WOLF'S ESTATE.

Assuming the liability of Wolf to Louis Stix & Co. to have rested entirely on the replevy bond, the question is presented whether such liability was provable against Wolf's estate in bankruptcy.

The bond was in the penalty of twenty thousand dollars, it was conditioned for the absolute payment of ten thousand dollars, the value of the goods replevied, and interest thereon, and not in the alternative for the return of the property. The only contingency in the bond was whether the event on which it was to be discharged, would or would not happen. If Wolf was cast in the suit by Louis Stix & Co. then the bond remained in force—if Wolf was not cast in the suit then the bond became void.

Wells vs. Griffin, 2 Head, pp. 568, 570.

The Code of Tennessee provides, in reference to bonds similar to that on which Wolf's liability rests: "The death or destruction of the property, without any fault of the defendant, after the replevy, is no defence to the liability on such bond." Sec. 3515.

And after the replevy bond is given the property is no longer in custody by virtue of the attachment, and the lien fixed by the levy of attachment is forever gone.

James vs. Galloway, 7 Heiskell, 678.

The amount of the recovery Louis Stix & Co. were entitled to, if entitled at all, was certain. No contingency could affect *that*. A calculation of interest only was required.

And the only contingency involved was to happen as soon as a pending suit, which had been nearly a year in the Court of last resort, where it would be finally disposed of, could be decided.

The liability on the replevy bond had all the essential elements of a debt payable on a future contingency. It came precisely within the definition of "contingent debts or demands" as used in the bankrupt law of 1841, given by Judge Metcalf in delivering the opinion of the Court in French vs. Morse, 2 Gray, 114:

"Contingent liabilities of a bankrupt are not provable, but only certain *debts*, contracted by him before bankruptcy, and payable after it *on a contingency*."

It can not be said here, as Judge Metcalf said in French vs. Morse, that at the time the bankrupt became such the creditor had not "any existing demand upon which *the cause of action* depended on a contingency; but the very existence of his demand depended on a contingency."

In this case the demand, the replevy bond, did exist in full force at the date of the bankruptcy. The only contingency was the termination of the suit of Louis Stix & Co. vs. Marks, Pump & Co. adversely to Wolf, which was the contingency on which the rtght of action of Louis Stix & Co. against Wolf on the demand, the replevy bond, depended.

It will hardly be contended that the class of provable demands is more restricted under the act of 1867, than under the act of 1841. The reverse is no doubt true.

Revised Statutes U. S., Sec. 5068, Bankrupt act, Sec. 19, provides:

"In *all* cases of contingent debts and contingent liabilities, contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for final dividend, or he may, at any time, apply to the Court, to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the Court shall order, and he shall be allowed to prove for the amount so ascertained."

It is always enough that the debt was provable whether it was actually proved or not is immaterial.

Hardy vs, Carter, 8 Humphreys, 153.

In Tobias vs. Rogers, 13 New York, 59, it was held that the claim of a surety on a replevy bond against his so-surety for contribution is barred, although judgment is not rendered in the replevin suit until after the discharge is granted.

The condition of a bond by the plaintiff in an action of replevin in Tennessee is "to be void if the plaintiff abide by and perform the judgment of the Court in the premises."

Code, sec. 3377.

In the case in the Supreme Court of Tennessee, of Cash vs. Quinichet, Mss. opinion, Jackson, April Term, 1873, the question was whether the plaintiff in an action of replevin, who, pending the action, had become a bankrupts, and had obtained his discharge, was thereby released from his liability to return the property or pay its value, where the judgment in the action of replevin was against him. The Supreme Court held he was discharged.

Choate was the surety on the replevin bond of Cash in the suit just mentioned, and subsequently the question came up in the case of Choate vs. Quinichet, MSS. opinion, Supreme Court of Ten-

nessee, Jackson, Fall Term, 1873, whether Choate, who also had, pending the suit, become bankrupt, and been discharged was thereby released from his liability as surety on Cash's bond. The Court held he also was discharged.

In the cases cited below, involving bonds in legal effect precisely the same as the bond of Wolf in this case, no doubt was entertained that the liability growing out of the bond, though there had been no judgment in the suit, was that kind of contingent debt, or demand, that might be proved, and that would be discharged by the discharge in bankruptcy. In fact the question was not argued in any of the opinions, but assumed. See

Carpenter vs. Turrell, 100 Mass. 450.
Odell vs. Wooten, 38 Georgia, 225.
Payne vs. Able, 7 Bush, (Ky). 344.
Loring vs. Eager, 3 Cushing, 188.
Hamilton vs. Bryant, 114 Mass. 543.
Williams vs. Atkinson, 36 Texas, 16.
Martin vs. Kilburn, 1 Central Law Journal, 94.

The principle of the case of Mace vs. Wells, 7 Howard, 272, appears to me to control this case. There the surety's right to demand payment of his claim from the principal did not exist when the principal became bankrupt, because at that time the surety had paid nothing on account of the principal, and it was uncertain whether or not he ever would pay anything; and yet the Court held the liability of the principal to the surety was provable. The fact of payment by the surety, which was the basis of his right to payment from the principal in Mace vs. Wells, was to transpire after the bankruptcy, just as the decision of the suit of Louis Stix & Co. vs. Marks, Pump & Co. adversely to Wolf was to transpire after his bankruptcy. In the nature of things there could have been no more doubt or uncertainty about the decision of the Court in the one case than there was about the payment of the principal's debt by the surety in the other.

And see Fullwood vs. Bushfield, 2 Harris, (Penn'a), 90.
Fentress vs. Markle, 2 G. Greene, (Iowa), 553.
Clarke vs. Porter, 1 Casey, (Penn'a), 141.
Dean vs. Speakman, 7 Blackford, 317.

In Stone vs. Miller, 4 Harris, (Penn'a), 450, 457–458, the doctrine of Mace vs. Wells was extended to the case of a guarantor whose guaranty was collateral to the principal debt, and who, at the time of his bankruptcy, had not been placed in default so as to be suable on the guaranty.

In McNeil vs. Knott, 11 Georgia, 142, the liability of the indorser of a promissory note was held provable against his estate in bankruptcy.

And see In Re Babcock, 3 Story Rep., 393.

In Spalding vs. Dixon, 21 Vermont, 45, 50-52, notes which had been delivered to become inoperative in a certain contingency, but which contingency had not occurred at the date of the bankruptcy, were held provable.

And in Fowler vs. Kendall, 44 Maine, 448, the claim of the sureties on an official bond, for money paid for the principal on account of a default occurring before the bankruptcy, but where the payment was made after the bankruptcy, was held provable against the estate of the principal in bankruptcy.

A policy of insurance is provable although the loss does not occur until after the commencement of the proceedings in bankruptcy.

Re American Glass Ins. Co., 12 Bankruptcy Register, 56.

And see generally Jemison vs. Blowers, 5 Barbour, 686.
Shelton vs. Pease, 10 Missouri, 473.
U. S. vs. Throckmorton, 8 Bankruptcy Register, 309, 311.
Jones vs. Knox, 46 Alabama, 53.
Hays vs. Ford, 55 Indiana, 52, 56-57.
Williams vs. Harkins, 55 Georgia, 172.

The case of Riggin vs. Magwire, 15 Wallace, 549, is not against my position. There the husband was living at the time the warrantor became bankrupt, and it could not be known that there would ever be such a claim as the claim of his wife for dower..

In this case there was no doubt about the claim of Louis Stix & Co. against Wolf, Lowenstein and Helman on the replevy bond

according to its terms, nor about the amount of that claim, and the only contingency was whether the duty of paying the sum the claim was for would ever become absolute. *Prima facie* the duty to make payment existed. In proving the claim in bankruptcy against the estate of Wolf, Louis Stix & Co. were authorized to assume Wolf was bound to pay the bond. The court in bankruptcy was bound to presume the same thing in ordering the manner of ascertaining and liquidating the value of the liability, if it became necessary to make such order, and in accepting the proof of it. Assuming the bond was payable it cannot be said there was the remotest contingency about the claim or the amount of it. To use the language employed in French vs. Morse, 68 Massachusetts (2 Gray), 111, the existence of the demand of Louis Stix & Co. against Wolf did not depend on a contingency, but while the demand was existing, the cause of action of Louis Stix & Co. against Wolf upon it depended on a contingency.

If there had been any impediment in the way of Louis Stix & Co. had they proved their claim in bankruptcy against Wolf it would have extended no further than the retention by the court in bankruptcy of their *pro rata* of the assets of the estate until the determination by the Supreme Court of Tennessee of the suit of Louis Stix & Co. vs. Marks, Pump & Co. At the termination of that suit the amount so retained would have been paid Louis Stix & Co., or have been distribnted amongst the creditors generally, as the result of the suit might have shown the one or the other entitled. There would have been no complication, or difficulty, in this mode of proceeding, and no very great delay in the settlement of the rights of all the parties.

See American Plate Glass & Fire Ins. Co., 12 Bankruptcy Register, p. 58.

It does not appear in this case that the order for a final dividend of Wolf's estate in bankruptcy was made before the final decree in the Supreme Court of Tennessee in the case of Louis Stix & Co. vs. Marks, Pump & Co. The presumption is that it was not. Unquestionably the court in bankruptcy could and would on the application of Louis Stix & Co. have postponed the

order for the final dividend until the Supreme Court had decided the suit.

Record, pp. 44-45.

But were this not so, there could have been no difficulty in Louis Stix & Co. applying to the court in bankruptcy to have the then present value of their liability ascertained and liquidated. It was, by the words of the law, then the duty of the court to cause the value of the liability to be ascertained and liquidated in such manner as the court should order. And thereupon Louis Stix & Co. would have been allowed to prove for the amount so ascertained.

It is to be presumed the court could have ordered a proper manner for ascertaining and liquidating the true value of the liability. I do not see how there could have been any difficulty in the act. But however this may have been, it is certain the court could have adopted *some manner*, and could have ascertained *some value*, and *any manner* which might have been ordered, and *any value* which might have been ascertained and liquidated, would have satisfied the requirements of the law. The discretion of the court in bankruptcy is made the absolute measure of the rights of the creditor in such a case, and however difficult it may be to arrive, by any mode that may be adopted, at the real value of the liability, the duty must be performed and the parties concerned must adjust their claims accordingly and abide by the adjustment.

If it be said that in this case the value of the liability of Wolf to Louis Stix & Co. in the replevy bond could not have been ascertained and liquidated because the contingency whether the court would decide the case of Louis Stix & Co. vs. Marks, Pump & Co. for Wolf or against him could not be estimated, I reply that the decision of a court of last resort on a case depending on facts all of which are of record in the court is not the kind of contingency which the bankrupt act will allow to be so doubtful or uncertain as to be incapable of ascertainment and liquidation.

However far from the truth, as a matter of fact, the theory of the law, and the only one on which it can be intelligently administered is that the law governing every particular case is certain; that in pronouncing decisions the courts merely announce the

a decree for money against Marks, Pump & Co. *personally*, and that the property fraudulently conveyed Wolf and attached in the suit as theirs, might be sold as such to pay the decree that might be recovered against them. The decree of the Supreme Court of Tennessee, as already shown, proceeded only on the liability on the replevy bond, and I suppose I may safely assume Wolf never was under any liability to Louis Stix & Co., except such as the replevy bond imposed.

The Code of Tennessee, Section 3509, expressly gave Wolf the legal right to execute the replevy bond, and thereby replevy the property attached. His doing so, then, could not possibly be construed into the creation of a debt by fraud or embezzlement. Such a construction would violate the spirit of the maxim, "*Executio juris non habet injuriam.*"

Broom's Legal Maxims, * p. 124, etc.

It would be strange indeed if it could be held a fraud to do that in the course of the proceedings in a suit which a statute expressly declares the party may do.

If it be true that Wolf owed no debt to Louis Stix & Co., that he did not become a debtor to them by becoming the fraudulent vendee of the property conveyed him by Marks, Pump & Co., and that his liability is, as I have stated, solely by reason of his having executed the replevy bond, it would seem unnecessary to say he is not in the attitude of a party who has *created a debt* by fraud or embezzlement. He replevied the property in the usual way, and it cannot be pretended there was fraud in the time, manner or circumstances of his executing the replevy bond.

No moral turpitude or criminality of Wolf was involved in the fact that Marks, Pump & Co. had made the conveyance to him. There is nothing in this record showing any actual fraud or positive wrong on the part of Wolf. The fraud he was guilty of, or rather participated in, if he may be said to have been guilty or to have participated in any, was what is known as *fraud in law*, or constructive fraud, and was but the conclusion of the law on a state of facts, which, if not perfectly innocent in a legal point of view, so far as Wolf was involved in them, would not, as we have

seen, have supported a civil action by Louis Stix & Co. against him.

Adler vs. Fenton, 24 Howard, 410.

It is impossible, therefore, that Wolf, in what he did, that is in receiving or accepting the fraudulent conveyance from Marks, Pump & Co., could have been guilty of any fraud whatever, as the word is understood in the law. A fraud resulting in injury but not actionable is unknown to the law.

The truth is, it is a misapplication of terms to say the vendee in a conveyance made to hinder, delay or defraud creditors is guilty of a fraud upon the creditors of the vendor. The law does not grant relief against the conveyance to such creditors on any such theory, but because the vendee had notice, express or implied, that the vendor was making the conveyance for the forbidden purpose.

After stating what constitutes the fraud intended by the statute of frauds Mr. Bump in his work on Fraudulent Conveyances says:

"Fraud, therefore, does not necessarily impute a corrupt or dishonorable motive. Parties may do what they consider perfectly fair for the purpose of preventing a sacrifice merely, and with the intention of paying all the creditors ultimately, or may be animated merely by motives of affection or compassion; but the law does not sanction any contrivance for either defeating or delaying creditors, and invalidates it without regard to the motives of the parties."

2 Edn., p. 25.

It is not necessary that the debtor and the grantee shall be actuated by like motives to cheat and defraud the grantor's creditors. The motives and intentions of the debtor and grantee may be different. If the grantee has notice at the time that the debtor is transferring his property to delay, hinder or defraud his creditors, it will make the transfer void, although he has no wish to defraud them, for the motive is imputed to him as a fraud in law and makes him a *mala fide* purchaser. If for instance he purchases because he considers the property cheap, and this is the only motive that induces him to purchase, or because he desires to

save a debt due to him by the grantor, the transfer is nevertheless fraudulent.

Bump on Fraud. Conv., (2d Edn), p. 201-202.

In the case of Neal vs. Clark, 95 U. S., 704, the court construed the word "fraud" as used in the 33d section of the bankrupt act, Revised Statutes U. S., Sec. 5117, to mean positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. I understand the case there to be the very same reported in 25 Grattan, p. 642, under the title, Jones Exrs. vs. Clark and others. The case in Virginia was the one principally relied on by the counsel for the defendants in the court below, where he strenuously contended that that case was precisely the present case, and should control the decision of the present case on the question whether the liability of Wolf was created by fraud. While I have never seen how it could possibly be said Wolf was under any liability to Louis Stix & Co., created by fraud, or how the case of Jones Exrs. vs. Clark and others was an authority at all applicable to the facts of his case, I do insist that the case of Neal vs. Clark is conclusive that under no possible view of Wolf's liability to Louis Stix & Co. can it be held to have been created by fraud. The facts in Neal vs. Clark were that the executor of Wm. Fitzgerald had sold certain notes he had taken for lands he had previously sold under the will of his testator to Neal at a discount, and had thereby committed a *devastavit*, and Neal had purchased the notes under circumstances which made him responsible for the *devastavit*. The sureties on the executor's bond, who had been substituted to the rights of the distributees of the estate, sued Neal for the value of the notes. Neal pleaded his discharge in bankruptcy in bar of the suit. The Court of Appeals of Virginia decided Neal had been guilty of constructive fraud in the purchase of the notes, which was such fraud as was meant by the 33d section of the bankrupt act, and that his discharge was no bar to the suit, and gave judgment against him for the amount of the two notes. On a writ of error this court reversed the judgment, holding that assuming Neal to have been guilty of the constructive fraud the Virginia court had decided he was guilty of, still his liability was discharged by the discharge in bankruptcy, inasmuch as "fraud," as used in the section of the bankrupt act, meant "positive fraud, or fraud in fact, involving moral turpitude, or intentional wrong, as does embezzlement."

96 U. S., p. 709.

See also Broach vs. Brown, 52 Mississippi, 536.
Flanaghan vs. Casy, 37 Texas, 67.

Even if it could be maintained that Wolf incurred a debt by fraud to Louis Stix & Co., still, as Wolf has given the replevy bond, and it has been accepted, and Louis Stix & Co. have undertaken to hold him liable by virtue of the bond, and not because of any fraud, the liability for the fraud has become merged in the bond, and Louis Stix & Co. are precluded from setting up the fraud to defeat the effect of the discharge.

In Palmer, Exr., vs. Preston, 45 Vermont, 154, the Court held that the recovery of a judgment upon a contract induced by fraud, is a waiver of the fraud, and the judgment is not a debt *created* by fraud within the meaning of the bankrupt act: and the plea of discharge in bankruptcy is a good defense to an action of debt founded on such judgment.

And see Shuman vs. Strauss, 52 New York R., 404, 407-408.
Bangs vs. Watson, 9 Gray 211, and authorities there cited.

A judgment in an action of trespass for assault and battery is a debt dischargeable under the bankrupt act of 1867 though the cause of action for the original tort would not have been.

Manning vs. Keyes, 9 Rhode Island 224.
In Re Wiggins, 2 Bissell 71, is to the same effect.

IV

Wolf having become bankrupt while the suit of Louis Stix & Co. vs. Marks, Pump & Co. was pending on appeal in the Supreme Court of Tennessee, and before any decree had been pronounced against him, he had the legal right to suggest the pendency of his bankruptcy, and thereupon to have the cause continued without further action, until his right to a discharge had been determined; and, when his discharge had been granted, to plead it in bar of the suit, and to have a judgment thereupon; and, inasmuch as he has been deprived of the right of suggesting his bankruptcy, and obtaining the continuance; and pleading his discharge, and having a judgment upon it, by the structure and practice of the Court, and without any fault or negligence of his own, he is entitled now to

have his case considered and decided as if he had in fact made the suggestion of his pending bankruptcy at or before the granting of his discharge; and had afterwards, in due form, before the decree of the Supreme Court was pronounced, pleaded his discharge in bar of the suit.

It has already been stated that the decree of the Chancery Court was in Wolf's favor, and that there never was a decree against him till that pronounced by the Supreme Court on the 27th April, 1877.

Hence, had he succeeded in getting his discharge in bankruptcy before that court as a defense, there never could have been any decree against him.

The Bankrupt Act, sec. 21, Revised Statutes United States, sec. 5106, provides "that no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit, at law or in equity, therefor against the bankrupt, until the question of the debtor's discharge shall have been determined and any such suit or proceedings shall upon the application of the bankrupt be stayed to await the determination of the court in bankruptcy, on the question of the discharge."

Under this provision of the law the bankrupt is entitled to a continuance of *all* suits until the question of his discharge is determined.

Ray vs. Wight, 119 Mass., 426.
National Bank of Clinton vs. Taylor, 120 Mass., 124.
In Re Rosenberg, 2 Bankruptcy Register, 236, and 3 Benedict's R., 14.
In Re Metcalf, 1 B. R., 201, and 2 Benedict, 78,
In Re Schwartz, 15 Bankruptcy Register, 330.
In Re Girardelli, 1 Sawyer, c. c. 343.
Towne vs. Rice, 122 Massachusetts, 67.
In Re Williams, 6 Bissell, 233, 236-237.

When his right to a discharge is determined, he then has the right to plead the discharge as a defense to the action, and is entitled thereupon to a final judgment in his favor.

Lewis vs. Shattuck, 4 Gray, 572.
Carpenter vs. Turrell, 100 Mass., 450.

"A discharge in bankruptcy, duly granted, shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were, or might have been, proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms, as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands. * * *

Revised Statutes U. S., Sec. 5119.

No court of original jurisdiction, in which a suit is pending, can refuse to receive the suggestion of a pending bankruptcy or refuse to allow the filing of the additional pleading necessary, to bring the discharge, when granted, to the notice of the court.

In Todd vs. Barton, 117 Mass., 291, the defendant suggested the pendency of proceedings by him in bankruptcy, and moved the court to grant a continuance of the cause to await the result of the proceedings. The court overruled the motion and pronounced a judgment against him. Thereupon the defendant upon a review, was allowed to plead his discharge in bar of the judgment, and the plea was held good.

In Carpenter vs. Turrell, 100 Mass., 450, a bond to dissolve an attachment was given, being in substance the same as our replevy bond. The defendants then became bankrupt, and suggested the pendency of the proceedings in bankruptcy, and afterwards pleaded their discharge.

On the trial the plaintiffs requested the Judge to find for them to the end that a special judgment for them might be entered, and they enabled to avail themselves of the bond given to dissolve the attachment.

But the court ruled that the defendants' discharge in bankruprcy was a bar to the further prosecution of the suit, and found for the defendants and gave judgment that they go hence.

In affirming the judgment of the court below the Supreme Court said:

"The plaintiffs contend that the bond is a mere substitute for

the attachment, and therefore that it should be considered in all respects as its precise equivalent.

"But such is not the purpose of the bond, nor the intention of the statute which authorizes it to be given. It does not merely restore the possession of the property to the debtor subject to the attachment—it dissolves the attachment utterly. It is not given for the property itself nor as security for its value, but for the payment absolutely of the judgment when recovered in the suit, whatever may be its amount. It is in many respects a higher and better security for the creditor than the attachment. It is not liable to be discharged by the insolvency or death of the debtor, nor by any facts which might dissolve the attachment without defeating the suit. * * * * * * *

"The bond, although a substitute for the attachment, is not its equivalent, and has not its incidents. The provision of the bankrupt act which preserves liens and attachments, cannot therefore have any application to it."

In McKay vs. Funk, 37 Iowa, 661, it was held that no personal judgment could be rendered by a State court against a defendant in a suit to foreclose a mortgage, although a decree of foreclosure might be entered, and that the error was not cured by an order staying execution on the judgment.

The court said: "Doubtless it was esteemed by the court below that the order staying the execution fully complied with the requirements of the section of the bankrupt act just cited; but it does not so appear to us. After the motion was filed nothing ought to have been done further than the entering of an order staying proceedings. But a judgment was rendered, which, however, was not to be enforced by execution until the further order of the court. The law was not followed, and the judgment against the defendant personally was therefore erroneous and must be reversed."

In Page vs. Cole, 123 Massachusetts, 93, a defendant in an action on a contract, after a verdict against him, but before judgment, became bankrupt. He then made application to have the case continued to await the determination of the bankruptcy court

upon the question of his discharge. The Superior Court overruled his motion and entered judgment on the verdict as of a day previous to the filing of the petition in bankruptcy. The Supreme Court reversed the judgment on the ground that after the application by the defendant for the continuance the court had no power to proceed further in the suit.

In delivering the opinion of the court in Wills vs. Claflin, 92 U. S. (2 Otto), 135, 141, Mr. Justice Davis said: "The bankrupt act prevents the institution and prosecution of suits against parties in bankruptcy."

In the Courts of Appeal of most of the States the practice prevails of giving the bankrupt the benefit of his discharge in bankruptcy upon its being brought in the first instance before such appellate court.

Fox vs. Weed, 21 Louisiana An., 58.
Viosca vs. Weed, 22 Louisiana An., 218.
Exchange Bank vs. Knox, 19 Grattan, 789.
Odell vs Wooten, 38 Georgia, 225.
Haggerty vs. Morrison, 59 Missouri, 324.
Bank of Bellows Falls vs. Onion, 16 Vermont, 470.
Parks vs. Goodwin, 1 Michigan, 35.
Bostwick vs. Dodge, 2 Douglass (Michig.), 331.
Cornell vs. Dakin, 38 New York, 253.
Monroe vs. Upton, 50 New York, 593.

But in Tennessee a different rule is adopted.

In overruling the petition of the appellants to be allowed to set up the discharge of Wolf and to have the benefit thereof, the Supreme Court of Tennessee based its action on the ground "that no new defense can be made in this court, and that it is not allowable to set up the defense of bankruptcy by any proceedings here for that purpose."

Record, p. 12.

The practice had been established long before, and has been uniformly adhered to.

Riggs vs. White, 4 Heiskell, 503.
Longley vs. Swayne, 4 Heiskell, 506, note.

Anderson vs. Reeves, 1 Tennessee Legal Reporter, p. 129.
Tunstall vs. Ward, 58 Tennessee (2 Baxter), 319.

In this last case the court decided that proceedings in the Supreme Court cannot be prevented by a plea, or suggestion and proof of a party's bankruptcy, and that the court would not receive such plea or suggestion.

When the propriety of the action of the Supreme Court of Tennessee in refusing Wolf the benefit of his discharge as a defense to the liability on the replevy bond was challenged, this court decided no error had been committed which it had jurisdiction to correct.

Wolf vs. Stix, 96 U. S. (6 Otto), 541.

It follows, therefore, that it was legally impossible for Wolf at any time after he filed his petition in bankruptcy to obtain the continuance of the suit of Louis Stix & Co. vs. Marks, Pump & Co., or the benefit of his discharge as a bar totihe suit, and that he was wholly without the means of preventing the rendition by the Supreme Court of the decree of the 27th April. 1877.

Lex non cogit ad impossibilia.
Broom's Legal Maxims, * p. 116.

The rule upon which the Supreme Court of Tennessee has acted is merely one of practice, and cannot have, and is not intended to have the effect of depriving parties of substantial rights.

Actus curiæ neminem gravabit.
Broom's Leg. Max., * p. 115, &c.
Actus legis nemini est damnosus.
Broom's Leg. Max., * p.

Under the bandrupt law it was the right of Wolf to suggest the pendency of his proceedings in bankruptcy to the court where the suit against him was pending, and to have the cause of Louis Stix & Co. against Marks, Pump & Co., so far as it concerned him, continued until his right to a discharge was determined; and then, upon receiving his discharge, to bring it before the court and have a judgment upon it, at the precise point at which the suggestion was made, that he go hence.

The suit could not lawfully proceed at all after the suggestion had been made by Wolf of his pending bankruptcy, until he brought his discharge before the court, and, then, only so far as it was necessary to protect him from the further prosecution of the suit.

Wolf was prevented from availing himself of these absolute rights, the right to suggest his discharge and stop the suit thereby, and to plead his discharge when obtained as a bar to the suit, without any fault on his part, or negligence, by a technical rule governing the course of proceedings in the court.

The least, therefore, that a court having the power to relieve him can do is to consider and give effect to the rights of Wolf, and Lowenstein and Helman, his sureties, as they were when Wolf filed his petition in bankruptcy, and afterwards, when he obtained his discharge, disregarding the subsequent proceedings of the Supreme Court of Tennessee and the judgment pronounced by it, if they have any injurious effect on those rights.

In other words, as the case of Louis Stix & Co. vs. Marks, Pump & Co., when Wolf filed his petition in bankruptcy and obtained his discharge stood on the appeal from the decree dismissing the bill as to Wolf, and no decree had been pronounced against Wolf and Wolf had by law the right to suggest the pendency of his proceedings in bankruptcy, and thereupon to have the suit proceed no further, and the further right upon obtaining his discharge to bring it before the court and have a judgment in his favor, this court will consider the rights of Wolf and Lowenstein and Helman precisely as they would have been had the suit of Louis Stix & Co. vs. Marks, Pump & Co. been in fact continued to await the determination of Wolf's right to a discharge, and, upon getting the discharge, and before the decree of the Supreme Court in that case had been pronounced against him, he had presented his present bill for relief.

Humphreys vs. Leggett, 9 Howard, 297.
Leggett vs. Humphreys, 21 Howard, 66.

This is upon the familiar principle that a court, and particularly a court of equity, always considers that as done which ought to

have been done, and done at the proper time, and in the proper manner, and by the proper person.

2 Story's Eq. J., sec. 64g.

And the principle on which a court of equity always proceeds in framing its decrees requires in this case just what the appellants here insist shall be done.

Story's Eq. J., secs. 28, and 437-439.

V

THE REMEDY OF THE APPELLANTS IS APPROPRIATELY IN CHANCERY, AND THE CASE MADE IN THE RECORD IS ONE ENTITLING THEM TO THE RELIEF PRAYED.

The cases in Tennessee already referred to showing that the Supreme Court will not receive a suggestion of a pending bankruptcy, or a plea of discharge in bankruptcy, in a suit pending there, establish the proposition that the appellants have no remedy by the ordinary course of the law.

This fact is enough to entitle them to relief in Chancery.

Story's Eq. J., secs. 49 and 53.

And so the Supreme Court of Tennessee has expressly adjudged.

Anderson vs. Reeves, 1 Tennessee Legal Reporter, 129.

And this court in dismissing the writ of error sued out by the appellants here to the decree of the Supreme Court of Tennessee in favor of Louis Stix & Co. against the appellants, after stating what the Tennessee court had decided, and that it had not decided Wolf's discharge in bankruptcy was inoperative as a release of the obligation involved, referring to the defense arising out of the discharge, said :

"Such defense may be made in Tennessee by bill in Chancery *after the decree* in the Supreme Court, but not by the suggestion of the fact in that court. *It was so decided* in Anderson vs. Reeves at the January Term, 1877, of the Supreme Court of that State, as

is shown by a copy of the opinion printed with the brief filed on behalf of the defendant in error in support of this motion."

Wolf vs. Stix, 96 U. S. (6 Otto), 543.

And at the same time this court virtually decided the appellants on such a bill would be entitled to the relief they now ask, using this language:

"We see no reason why, according to the practice in that State, the plaintiffs in error *are not still* at liberty to enforce the discharge in bankruptcy against the decree of the Supreme Court by bill in Chancery."

96 U. S. (6 Otto), 543.

The Chancery Court was authorized to grant relief against the decree of the Supreme Court by injunction, or otherwise, on the ground that such decree had been improperly obtained.

Bank, &c., vs. Hancock's admr., 6 Dana (Ky.), * p. 284.
McClellan vs. Cook, 4 Maryland. Ch., 398.
High on Injunctions, sec. 157.
And see Humphreys vs. Leggett, 9 Howard, * p. 297.

And such is the practice in Tennessee.

Marsh vs. Haywood, 6 Humphreys, 210.

The objection made on the other side to this mode of relief is that the appellants have slept on their rights, inasmuch as they should have filed the bill before the decree in the Supreme Court on the replevy bond was rendered, and, therefore, have been guilty of *laches*, and will not be relieved now.

The bill it has been shown was filed during the next month after the decree of the Supreme Court was rendered. That, of course, was within a reasonable time *after* the decree.

It is true that injunctions may issue to restrain proceedings at law, and, under certain circumstances, proceedings in equity, at any stage of the proceedings, whether before or after decree.

But my understanding is that a defendant in a suit at law, or in equity, having a complete defense to the whole suit, but so situ-

ated that he cannot avail himself of the defense to prevent the judgment or decree against him in the particular suit, has generally the option to file his bill in equity setting up his defense either *before* or *after* the judgment or decree.

No doubt there are exceptions to the general rule, but I have found no case holding a party guilty of *laches* merely because he waited for the rendition of a judgment or decree, instead of filing his bill to prevent the judgment or decree.

In many cases a court of equity requires that a judgment at law shall go before it will issue the injunction.

High on Injunctions, sec. 52.

It is to be remembered, also, that the suit of Louis Stix & Co. against Marks, Pump & Co., in which the decree on the replevy bond was pronounced, was itself a suit in equity, and that the ordinary rule is that a court of equity will not enjoin proceedings within itself, or in any other court of equity.

High on Injunctions, sec. 161.

This is the rule in Tennessee.

Deaderick vs. Smith, 6 Humphreys, * p. 138.

It is therefore very questionable whether, considering the Supreme Court of Tennessee merely as another court of equity, an injunction would have been issued, even if applied for, before that court had pronounced the decree of the 27th April, 1877.

The ordinary way certainly is to allow the final decree to pass, and then apply for relief against the decree, or the execution of it.

Parker vs. Britt, 4 Heiskell, 245-250.
Douglass vs. Joyner, 57 Tennessee (1 Baxter), 32.
Story's Eq. J., secs. 886, 887, &c.

Another consideration ought to be conclusive that the application for the injunction was properly delayed till after the decree. The Supreme Court of Tennessee is the highest court of the State, and as such has jurisdiction of appeals from the Court of Chancery, and would have been exercising such appellate jurisdiction in the

very case in which it was necessary to attempt to prevent it by the injunction, had the application been made before the decree.

It would be an anomaly in the law, and might lead to strange, if not ruinous consequences, if the Chancery Court, in such a case, could grant an injunction to stay proceedings in the Supreme Court.

Such a thing has never been known, so far as my information extends.

High on Injunctions, sec. 157.

Roshell vs. Maxwell, Hempstead's Circuit Court Rep , p. 25.

It is enough, however, to be able to say that the Supreme Court of Tennessee, as understood by this court, has already decided that such a bill as the present is to be filed after the decree, from which the party desires to be relieved.

96 U. S. (6 Otto), p. 543.

The general rule is stated by Judge Story as follows:

"After judgment at law any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself, or his agents, will in general authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment.

2 Story Eq. J., sec. 887.

Marine Ins. Co. vs. Hodgson, 6 Cranch, 332.

Again the same author says:

"But relief will be granted when the defense could not at the time, or under the circumstances, be made available at law without any *laches* of the party. Thus, for instance, if a party should recover a judgment at law for debt, and the defendant should afterwards find a receipt under the plaintiff's own hand for the very money in question, the defendant (where there was no *laches* on his part) would be relieved by a perpetual injunction in equity. So, if a fact material to the merits should be discovered after a

trial, which could not by ordinary diligence have been ascertained before, the like relief will be granted."

Eq. J., sec. 894

Scott vs. Shreve, 12 Wheaton, 605.

The decisions in Tennessee are to the same effect.

Kearney vs. Smith, 3 Yerger (Cooper's Ed'n), * 127, and cases referred to.

Rice vs. Railroad Bank, 7 Humph., 39.

Rigeway vs. The Bank of Tennessee, 11 Humph., 523.

Mewborn vs. Glass, 5 Humph., 520.

In Carrington vs. Holabird, 17 Connecticut R., 530, the following was the state of facts:

In August, 1841, Holabird brought an action against Carrington and caused process to be served on him. Carrington did not appear. The suit stood till August, 1842, when Holabird recovered judgment by default against Carrington for his debt. In February, 1842, Carrington applied for the benefit of the bankrupt act of 1841, and on 1st July, 1842, obtained a certificate of discharge in bankruptcy. In October, 1843, Holabird took out execution on his judgment and had it levied upon Carrington's property acquired after his discharge. Carrington applied for a new trial, and an injunction of the proceedings on the execution by bill in equity. Held (1) that the proceedings in bankruptcy constituted a meritorious defense to the claim of Holabird, being neither immoral nor in any respect inequitable, which Carrington had been deprived of without his fault, and ought to have an opportunity to interpose; (2) that a bill in equity for a new trial and an injunction against the proceedings to enforce the judgment against Carrington was a proper mode in which to seek relief and have the benefit of the discharge.

The rule the court announced was as follows:

"This jurisdiction [for new trials of actions at law and for injunctions against judgments] will be exercised when, to enforce a judgment recovered, is against conscience and where the applicant had no opportunity to make defense, or was prevented by accident or the fraud or improper management of the opposite party and without fault on his own part."

17 Conn., 537.

In Dick vs. Powell, 2 Swan, 632, Dick & Co. sued Powell in the Circuit Court of Haywood county 31st May, 1841, and obtained judgment 10th of October, 1842, for $2707. On the 5th of September, 1842, Powell filed his petition as a voluntary bankrupt in the District Court of the United States for the District of West Tennessee under the bankrupt act of 1841, and on the 6th of July, 1843, he received a certificate of discharge. On the 8th of March, 1852, Dick & Co. sued out an execution on their judgment, and thereupon Powell by petition applied to the Circuit Court for a *supersedeas*, which was granted, and made perpetual and taken to the Supreme Court, where the judgment was affirmed.

The case of Starr vs. Heckart, 32 Maryland, 267, was as follows:

Heckart recovered a judgment against Starr in 1858. In 1859 Starr obtained his final discharge under the insolvent laws of Maryland. In 1866 Heckart sued out a writ of *scire facias* on the judgment of 1858, and after two *nihils*, equivalent by law to a service, a *fiat* was entered, and in 1868 an execution was issued and was levied upon the property of Starr acquired after his discharge. Starr had no actual notice of the writs of *scire facias* and the proceedings thereunder, until his property was seized under the execution. He then filed his bill praying for an injunction to restrain Heckart from proceeding with the execution. The court held "That the final discharge in insolvency was a good defense to the *scire facias*, and as Starr, without fault or *laches* on his part, had not been allowed an opportunity to plead it, and being without a full and adequate remedy at law, he was entitled to an injunction."

The case of Leggett vs. Humphreys, 9 Howard's U. S. S. C. R., p. 297, was substantially like the present.

Humphreys was one of the sureties on the bond of Bland as Sheriff of Claiborne county, Mississippi. In March, 1839, Leggett, Smith and Lawrence sued Bland and his sureties on his official bond for some breach thereof, and subsequently the Circuit Court of the United States, where the suit was, rendered judgment for the defendants. The plaintiffs in the suit carried it by writ of error to the Supreme Court of the United States, where in Febru-

ary, 1845, the judgment of the Circuit Court was reversed and the case was remanded to it with directions to enter a judgment against Humphreys, who was the surviving surety. In the meantime, at the May term 1840 of the Claiborne Circuit Court judgments were entered against Bland and his sureties on his official bond, and the whole amount of the penalty of the bond was collected by a levy and sale of the property of Humphreys. After the mandate of the Supreme Court had been filed in the Circuit Court Humphreys appeared there and offered to plead the above facts *puis darrein continuance* as showing payment of the bond. But the court refused to receive his plea on the ground that the mandate of the Supreme Court was imperative to enter a judgment for the plaintiffs, and it did so. Humphreys then filed his bill in equity and prayed an injunction against issuing an execution on the judgment. The plaintiffs-at-law, defendants to the bill, demurred to it, and the Circuit Court sustained the demurrer, and dismissed the bill, and Humphreys appealed to this court. The court was of opinion that Humphreys was entitled to the relief prayed in his bill, and reversed the decree of the Circuit Court.

The syllabus is as follows:

(1) "In modern practice courts usually give summary remedy on motion, where a writ of *audita querela* was formerly used; but a bill in equity will also lie.

(2) "Therefore where a defendant had a good defense, which occurred after the cause was sent back to the Circuit Court from this court, and under the mandate of this court was prevented from pleading it, equity relieved him by enjoining the judgment."

The last proposition is inaccurate, as a reading of the case will show, in stating that the defense occurred "*after* the cause was sent back to the Circuit Court from this court." It clearly appears from the facts already recited that the defense occurred, that is the facts out of which it arose transpired, in May, 1840, while the cause was pending in the Supreme Court, and four or five years before the reversal was had, or the mandate sent down. See p. 313-314, 9 How.

The principle on which the court understood itself as proceeding was that stated in Truly vs. Wauzer, 5 Howard U. S., 142, with regard to injunctions after judgments at law, "that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment."

This is the very language used by Judge Story, Eq. J., sec. 887, and quoted elsewhere in this brief.

In applying the principle to the facts in the case before it, the court said: "The surety has been compelled to pay the whole amount of his bond by process from the State courts before the present defendants obtained their judgment against him, but after the institution of their suit. This would have been a good defense to the action if pleaded *puis darrein continuance.* The complainant tendered this plea at the proper time, and was refused the benefit of it. not because it was adjudged insufficient as a defense, but because the court considered they had no discretion to allow it. The mandate of this court was probably made without reference to the possible consequences that might flow from it. At all events, it operated unjustly by precluding the complainant from an opportunity of making a just and legal defense to the action. *The payment was made while the cause was pending here.* The party was guilty of no *laches*, but lost the benefit of his defense by an accident over which he had no control. He is therefore in the same condition as if the defense had arisen after judgment, which would entitle him to relief by *audita querela* or a bill in equity for injunction."

The same case came again before the court, Leggett vs. Humphreys, 21 Howard, 66. The former opinion was affirmed, and a decree of the Circuit Court perpetually enjoining the judgment against Humphreys was pronounced correct. One proposition of the syllabus is, "That as Humphreys was not permitted to plead *puis darrein continuance* the satisfaction of

the penalty of his bond, &c., he was entitled to relief in equity." On the second hearing the further circumstance appeared in the case that Bland, the principal, had fully indemnified Humphreys, the surety, before payment thereof by him, by placing money or property in his hands exceeding the amount of the penalty of the bond. The question on this part of the case was whether, under the above state of facts, Humphreys had in fact paid the bond, since he did not part with his own money in doing so; and whether on that ground it should not be held that he was not entitled to an injunction against the execution of the judgment Leggett, Smith and Lawrence had recovered against him? The court held the circumstance that Bland had indemnified Humphreys immaterial, as it was his duty to indemnify him, and that Humphreys, having paid the bond, was entitled to the perpetual injunction against the execution of the judgment of Leggett, Smith and Lawrence, notwithstanding he had been indemnified.

VI

The relief granted must extend to Lowenstein and Helman, the sureties on the replevy bond Wolf gave, as well as to Wolf, because the condition of their liability, as expressed in the bond, was that there should first be a specified recovery against Wolf in the suit, which means, of course, such a recovery as could lawfully be enforced by process of execution or otherwise against him.

By reference to the bond it will be seen it was necessary the following facts should concur in order that it might remain in full force and effect: (1) That Wolf should be cast in the suit; and (2) that the stock of goods and other property attached should be found and decreed by the Court to have been subject to the attachment, and liable thereunder to the satisfaction of the debt of the complainants against Marks, Pump & Co. If either of these facts failed to transpire, then the bond was to be void. If the bond remained in force according to the condition, then and in that event, its obligation was that Wolf should pay to complainants, as the court might order and direct, the said sum of ten thousand dollars, the value of the said stock of goods and other property, with interest thereon from the date of the bond.

Record p.p. 30–31.

It thus appears it was necessary for the court judicially to do three things before the duty to pay the money due upon the bond would be complete. (1) To decide the suit against Wolf; (2) To find and decree the goods and property attached to have been subject to the attachment and liable thereunder to the satisfaction of the debt of Louis Stix & Co. against Marks, Pump & Co.; and (3) To order and direct the time and manner in which Wolf should pay to Louis Stix & Co. the sum found and decreed to be due under the bond.

And, when the bond had been forfeited, by the very terms of the law under which it was authorized and taken the judgment or decree to be entered upon it was required to be against Wolf *and* Lowenstein *and* Helman. See Code, sec. 3514 already copied, and sec. 3509 authorizing the bond, which is as follows: "The defendants to an attachment suit may always replevy the property attached by giving bond with good security, payable to plaintiff in double the amount of the plaintiff's demand, or, at the defendant's option, in double the value of the property attached, conditioned to pay the debt, interest and costs, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit."

No separate judgment or decree against Lowenstein and Helman, the sureties, omitting Wolf, the principal, could lawfully have been rendered. Neither the condition of the replevy bond nor the law would have permitted any such thing.

Now, it is apparent that if my position that Wolf's proceeding in bankruptcy, followed by his discharge, was in law a barrier to the prosecution of the suit of Louis Stix & Co. vs. Marks, Pump & Co., *as to him*, and precluded the rendition by the Supreme Court of Tennessee of any decree which could bind him, that the state of facts contemplated by the condition of the replevy bond as authorizing a decree upon it, has never transpired, and the decree of the Supreme Court that Louis Stix & Co. recover of Low-

enstein and Helman the amount due upon the bond has been pronounced contrary to law.

The release of the sureties, Lowenstein and Helman, is not the effect of the discharge of the principal, Wolf, considered merely with reference to its effect to discharge or solve the sureties' undertaking in their contract, but results from "the determination of the contingency upon which the obligation of the bond is made to depend."

The provision in Section 5118 of the Revised Statutes United States, Bankrupt Act, Section 33, that "no discharge shall release, discharge or affect any person liable for the same *debt* for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise," has therefore no effect on the question.

It will not, of course, be argued that that provision extends the liability of a surety beyond the terms of his undertaking in his bond.

The Supreme Court of Tennessee has declared that the provision "only applies to a surety who contracted to become liable for the payment of *the debt*, and not for the payment of *the judgment*, which might be entered in a particular action."

Martin vs. Kilbourn, 1 Central Law Journal, p. 94.

Applying the principle to a case like the present Mr. Bump in his Bankruptcy (9th Edn.), pp. 733-734, says: "A bond given to dissolve an attachment is *not such a debt*. It does not become of the nature of a debt until the contingency arises upon which it is to be made operative, to-wit: *a judgment valid against the principal, and which he is bound to pay*. When a judgment is rendered for the defendant upon a plea of discharge in bankruptcy, the bond is discharged, *not by the proceedings in bankruptcy, but by the determination of the contingency upon which the obligation of the bond is made to depend.*"

In Phillips vs. Solomon, 42 Georgia, p. 192, the court said:

"It was not the intent of Congress to do anything more than to declare that the bankrupt act should not be *construed* so as to discharge sureties; and this was done, not so much to fix the law of the case, as by way of caution, to prevent the act from being construed to have an effect that, by its terms, it would not have. In other words, the *contract* of a surety, as it is understood in the commercial world, is always conditioned that the surety shall *not* be discharged by the bankruptcy of the principal. * * * * * * And Sections 33 and 34 of the Bankrupt Law of 1866-7, and the provisions of the Bankrupt Laws of 1841 and of 1800, are only in furtherance of and declaratory of what would have been true had these sections not been put into the acts." p. 195.

In this view, the bankrupt act imposes no burden on the surety *not* upon him before, but simply provides he shall not avail himself of the proceedings of his principal in bankruptcy to relieve himself of those burdens he *has* assumed.

It has already been shown that the effect of executing the replevy bond was to release the property attached from the custody of the attachment, and to discharge the lien on it fixed by the levy of the attachment. Thereafter Louis Stix & Co. had only the replevy bond to look to for satisfaction of the recovery they might succeed in obtaining.

Code of Tennessee, Sections 3509, 3514.
James vs. Galloway, 7 Heiskell, 678.

The authorities already cited have shown also that the replevy bond was not merely a substitute for the property attached, and that such bond does not now stand in the place or stead of such property. It is a substantive undertaking, entered into under the law and standing by itself, and the rights and obligations of the parties to it are to be determined simply by a proper interpretation of it with reference to the facts referred to in it which have come into existence since it was made.

Code of Tennessee, Section 3515.
Wells vs. Griffin, 2 Head, 568, 570.
Carpenter vs. Turrell, 100 Massachusetts, 450.
Hamilton vs. Bryant, 114 Massachusetts, 543.
Braley vs. Boomer, 116 Massachusetts, 127.

No principle in the law is more definitely settled, or has been more uniformly and vigorously administered than the principle that the undertaking of a surety is to be construed liberally in his favor, and that his liability is always *strictissimi juris*, and cannot be extended by construction.

McCluskey vs. Cromwell, 1 Kernan, 398.
McMicken vs. Webb, 2 Howard U. S., 298.
Leggett vs. Humphreys, 21 Howard, 76.
United States vs. Boecker, 21 Wallace, 652, 657.

If a bond required by the law binds the sureties for more than the law requires them to be bound for, they are bound only to the extent that the law requires them to be bound, and for the residue the bond is void.

Terry vs. Stukely, 3 Yerger, 506.
Polk vs Plummer, 2 Humphreys, 500.
Banks vs. McDowell, 1 Coldwell, 84.
United States vs. Howell, 4 Washington C. C., 620.

On the other hand, if the undertaking as expressed in the bond is not broad enough to embrace the conditions the law requires the bond to contain, the sureties are not bound beyond the terms of the bond, and no recovery can be had for the breach of any condition required by the law, but *not* contained in the bond.

Nichol vs. McCombs, 2 Yerger, 83.
Jones vs. Parsons, 2 Yerger, 321.
Banks vs. Brown, 4 Yerger, 198.
Gholson vs. Brown, 4 Yerger, 496, 502.
Jenkins vs. Skillen, 5 Yerger, 288.
Smith vs. Erwin, 5 Yerger, 296.
Triplet vs. Gray, 7 Yerger, 7 Yerger, 16.
Albertson vs. McGee, 7 Yerger, 106.
Tipton vs. Anderson, 8 Yerger, 222.

We have seen Section 3509 of the Code prescribed, as the condition of the replevy bond, only that the obligors should pay the value of the property attached and interest, in the event Wolf *should be cast in the suit.* It is possible this phrase includes all the bond in fact expresses. But there are, as has been seen, two other conditions of liability specified in the bond—(1) That the stock of goods and other property attached should be found and decreed

by the court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of Louis Stix & Co. against Marks, Pump & Co.; and (2) that the court should order and direct the time and manner in which Wolf should pay to Louis Stix & Co. the value of the goods and other property attached and interest thereon. If, therefore, these additional conditions mean substantially anything more than the condition prescribed in the statute means, then Lowenstein and Helman have the right to insist upon their literal performance, and to claim they shall not be held liable unless such performance has been shown.

In Bein vs. Heath, 12 Howard, * p. 168, an injunction bond taken in the Circuit Court of the United States in a suit in equity was sued upon. The condition was "to pay all such damages as the obligee may recover against us," that being the usual form in the courts of Louisiana, where the suit was. Under the State practice the court decreed the damages in the suit in which the bond was given after dissolution of the injunction, both against the principal and the sureties. But no such decree could be rendered by the Circuit Court of the United States on the dissolution by it of the injunction The court in deciding the case said the bond was to pay the damages that might be recovered against the obligors. That as there had been no recovery against the obligors at the time of the institution of the suit on the bond, the contingency on which they agreed to pay had not happened, and the condition of the bond was not broken, and consequently no action could be maintained on it. And concluded: "It would be against the well established rule of the Chancery Court to extend the liability of the surety by any equitable construction beyond the terms of the contract. And in a proceeding upon a bond the liability of the principal obligor cannot be extended beyond that of his surety."

12 Howard, p. 179.

Very similar decisions have been made in Tennessee.

Smith vs. Eakin, 2 Sneed, 456.

Carren vs. Breed, 2 Coldwell, 465.

Martin vs. Kilbourn, 1 Central Law Journal, 94.

In Payne vs. Able, 7 Bush. (Ky.), 344, Payne brought three actions against Able to recover debts due, and sued out attach-

ments and had them levied on the property of Able. Able for the purpose of relieving the property attached gave three bonds with sureties, two conditioned in effect to "perform the judgment of the court in the suits," and the third "to produce the property to abide the judgment of the court." Pending the attachment suits, Able filed his petition in bankruptcy, and obtained his discharge, and pleaded it as a defense to the further prosecution of the suits against both Able and his sureties. Payne claimed judgment notwithstanding the discharge against him. The court held that Able's discharge not only released him from liability for the debts sued for, and on the bonds, but prevented the further prosecution of the suits against him.

7 Bush., 346.

And as no judgments could be rendered against Able, by reason of his discharge, no judgment could be rendered against his sureties on the bonds, as the contingency on which their liability was to become absolute, viz: the recovery of the judgments in the suits against Able never happened.

7 Bush. 348.

In Georgia the surety in an appeal bond is bound only for the payment of the debt or damages for *which judgment may be entered* in the cause, and if no judgment is ever entered against the principal in the cause, no liability attaches to the surety.

In Odell vs. Wooten, 38 Georgia, R. 224, pending an appeal to the Supreme Court, the appellant was discharged in bankruptcy and produced his discharge to the court, and the question was whether a judgment could be pronounced against his sureties.

The court decided that the bankrupt act forbids the prosecution of an action against a person adjudged a bankrupt, until the question of his discharge has been determined, and relieves him, when discharged, from all debts and liabilities, etc., which might have been proved against his estate; and in the case before the court as the appellant, the principal in the appeal bond, had been discharged in bankruptcy, the sureties in the appeal bond were no longer liable, as the discharge of the principal had terminated the case against him, and prevented any judgment ever being rendered. The court held that "the security in the appeal bond does

not contract to pay *the debt but the judgment that may be entered in the suit then pending.*"

38 Georgia, 226-227.

In Carpenter vs. Turrell, 100 Mass., 450, 452-453, the court referring to the provision of the bankrupt act, continuing the liability of sureties, notwithstanding the discharge of the principal, and replying to the position that it bound the sureties in a bond to dissolve an attachment, or, as we call it, a replevy bond, said: "We understand that provision to apply to persons who are liable for *the debt* of the bankrupt which existed before and is discharged by the proceedings in bankruptcy. This bond was not such a debt. It does not become of the nature of a debt until the contingency arises upon which it is to be made operative, to-wit: a judgment valid against the principal, and which he is bound to pay, but which remains for thirty days unpaid. *The obligation of the principal himself is merely collateral to the suit.* Until judgment the bond bears a relation to the actual debt not unlike that of a replevin or bail bond, or recognizance with sureties upon appeal. They are incident to the legal proceedings, and follow the result of the suit. If the plaintiff become non-suit the debt would not be discharged, but the bond would be. So when judgment is rendered for the defendant upon the plea of a discharge in bankruptcy the bond is discharged, *not by the proceedings in bankruptcy*, but by the determination of the contingency upon which the obligation of the bond is made to depend."

The case followed the older case of Loring vs. Eager, 3 Cushing, p. 188, where the matter was fully considered on a state of facts almost the same.

In Hamilton vs. Bryant, 114 Mass., 543, the facts were similar to those in Carpenter vs. Turrell, except that in the latter the bond to dissolve the attachment was given *before* the defendant was adjudged a bankrupt, while in Hamilton vs. Bryant the attachment continued in existence until *after* the defendant was adjudged a bankrupt, after which fact the bond was given. The court said, referring to Carpenter vs. Turrell: "Here, as in that case, the bond does not become of the nature of a debt until the contingency arises on which it is to be made operative, to-wit: a

judgment against the principal, which he is bound to pay, and which for thirty days remains unpaid. As we cannot now render judgment against the principal, the bond is discharged by the determination of the contingency upon which the obligation of the bond is made to depend." p. 544. And see Braley vs. Boomer, 116 Massachusetts, 127, 129.

The case of Williams vs. Atkinson, 36 Texas R., 16, was a case presenting the question of the liability of the surety on a replevin bond in an attachment suit, where the principal in the bond had been discharged in bankruptcy pending the attachment suit, and was decided in the same way as Carpenter vs. Turrell and the other cases cited.

The condition of an appeal bond in Tennessee is "for the payment of the whole debt, damages and costs, and for the satisfaction of the judgment of the Superior Court where such cause may be finally tried or determined" or "for damages and costs only," as the case may be.

Code, secs. 3162, 3163, 3141.

A party appeared from the judgment of a justice of the peace and gave the usual bond, and while the case was pending in the Circuit Court the Appellant filed his petition in bankruptcy, and obtained his discharge and pleaded it in bar of the further prosecution of the suit against him. The Circuit Court thereupon pronounced judgment against the surety in the appeal bond, and he appealed therefrom to the Supreme Court. The Supreme Court reversed the judgment of the Circuit Court, held the surety not liable upon reasoning similar to that in Payne vs. Able, 7 Bush. Ky., 344, and expressly referred to and approved the latter case.

Martin vs. Kilbourne, 1 Central Law Journal, p. 94.

The replevy bond has been likened to a bail bond and is not very, if at all, different in legal effect so far as concerns the present question. The sureties in bail bonds are released by the discharge where the bankruptcy occurs before the bond is forfeited, or the bail fixed.

In Nettleton vs. Billings, 17 New Hampshire, 453 upon

scire facias against bail asking judgment for the debt of the principal, the defendant moved the court for a stay of proceedings, because after he became bail, and after the plaintiff had obtained judgment against the principal, and before the commencement of the *scire facias*, the principal had obtained from the District Court of the United States a discharge in bankruptcy from all his debts, and the court sustained the motion, holding: That "if the bail were to surrender the principal it would be unlawful for the creditor to proceed against him. By the effect of the proceedings in the District Court the debt is wholly discharged, and if arrested, the court would on motion, order him to be set at large."

17 N. H., p. 456.

Kirby vs. Garrison, 1 Zabriskei, N. J., 179, was an action on a bail, or limit bond against a surety. The plea was a discharge in bankruptcy of the principal before the breach of the bond. The plea was held a good defense.

In Barber vs. Rodgers, 71 Penn'a St. R., p. 362, a party had been arrested for debt, and to be released gave bond to apply to a State Court to be discharged as an insolvent; he appeared and the hearing in the State Court was continued from time to time, and whilst it was pending he was adjudged a bankrupt in the United States District Court, and the proceedings in the State Court in insolvency were discontinued. *Held*, in an action on the bond, that the condition of the bond was discharged and the sureties released.

In Hubert vs. Horter, 81 Penn'a St. R. p. 39, the bond to apply to be discharged as an insolvent debtor was given whilst the proceedings in bankruptcy of the principal were pending. The principal applied to be discharged, but the State Court refused his application because of the pending proceedings in bankruptcy. *Held*—The dismissal by the State Court of the application was a defense to an action on the bond, and a release of the sureties.

The two cases just referred to followed Nesbet vs. Greaves, 6 Watts & Serg., 120, under the Bankrupt Act of 1841, which decided the same principle.

The counsel for the appellees in their brief seem to admit Wolf's discharge in bankruptcy had the effect of discharging *him* from liability on the replevy bond. If so, it is because the court must treat the decree against him rendered by the Supreme Court of Tennessee as inoperative to bind him. It is certainly settled that a bankrupt who allows a decree to go against him for a demand to which he has opportunity to plead his discharge as a defence, is as completely bound by the decree as if his discharge had not existed. It is then impossible that the decree of the Supreme Court shall stand, and Wolf at the same time be held to be discharged from liability under it. If the decree do not stand as to Wolf, then surely it cannot stand as to Lowenstein and Helman, because the condition on which a decree could go against them, as expressed in the replevy bond, was that a decree should first go against Wolf. A decree against Wolf, not having the usual or ordinary effect of a decree, or not being enforceable against him, is of course *no* decree within the meaning of the replevy bond. The admission, therefore, that Wolf's discharge has the effect of relieving him from liability under the decree, is an admission that Lowenstein and Helman are not bound by it. The only obligation they ever assumed was as sureties of Wolf. That obligation extended not to the payment of a debt Wolf was admitted to owe, but only to the payment of a decree that might be rendered against him in a pending suit, wherein it was not ascertained at the time whether or not there ever would be a decree against him. The decree contemplated was a decree Wolf would be under a legal obligation to pay, and one that could be enforced against him in case he failed to make voluntary payment. Being only sureties, Lowenstein and Helman, if compelled to pay such decree, would have recourse on Wolf for reimbursement. It is all-important to them, therefore, that Wolf be bound by and under obligation to pay the decree, as otherwise they would have no one to look to for indemnity.

It is all-important to Wolf, too—indeed, an indispensable condition to his protection from further liability on the replevy bond or the decree upon it—that Lowenstein and Helman be discharged from the replevy bond or the decree, as well as himself. If they are compelled to pay the amount due under it, as required by the decree of the Supreme Court of Tennessee, it is very clear Wolf

is liable to repay to them the amount they are compelled to pay.

Loring vs. Kendall, 67 Massachusetts, 1 Gray, 305.
Fowler vs Kendall, 44 Maine, 448.
Ellis vs. Ham, 28 Maine, 385.
Leighton vs. Atkins, 35 Maine, 118.
Holbrook vs. Fox, 27 Maine, 441.
Porter vs. McDonald, 32 Maine, 418.
Pogue vs. Joyner, 6 Arkansas, (1 Eng.) 241.

In Page vs. Cole, 123 Massachusetts, 93, the defendant appeared and gave the required bond to dissolve the attachment of his personal property. There was a verdict for the plaintiff in the court below on the 16th of October. On the next day the defendant moved for a new trial. The motion after having been postponed on the application of the defendant, was to have been argued on the 10th November at four o'clock in the afternoon. On that day the defendant filed his voluntary petition in bankruptcy. Before the hour fixed for the hearing of the motion for a new trial, a suggestion of the defendant's bankruptcy was filed in the case, and the usual motion was made for a continuance of the cause. The court refused the continuance, and proceeded to hear the motion for a new trial. Afterwards, it overruled the motion for a new trial and gave judgment for the plaintiff as of a day preceeding the filing of the petition in bankruptcy. On receptions the Supreme Court reversed this judgment, saying: "After the suggestion of the bankruptcy and the application to continue, the Superior Court had no power to proceed further in the suit. It had no more power to enter a judgment as of a former day, the effect of which would be to hold the sureties on the bond to dissolve the attachment, to render the bankrupt liable to his sureties for such sum as they might pay, notwithstanding his discharge, and thus practically prevent his discharge from operating upon this debt, than it had to enter a judgment as of the day on which the order was made."

It could be of no possible practical benefit to Wolf to discharge him from liability on the decree of the Supreme Court of Tennessee directly to Louis Stix & Co., and then hold him bound to Lowenstein and Helman for what they might pay on the decree. In effect he would be bound for the debt as fully in the one case as in the other, and his discharge in bankruptcy would be ineffective to release him.

And so, we come back to the proposition that if the discharge in bankruptcy has released Wolf from liability on the replevy bond and the decree, it necessarily has released his sureties, Lowenstein and Helman, also.

It is argued in the brief for the appellees that the condition of the replevy bond on which the liability of Lowenstein and Helman, the sureties, depended, has happened, because Wolf *has been cast* in the suit of Louis Stix & Co. against Marks, Pump & Co., and the court *has rendered* a decree against him. This is reasoning in a circle. In effect it is merely saying no relief can be had against the decree of the Supreme Court, *because that decree has been rendered.* The necessity for filing the present bill arose from the fact that the decree *had been rendered.* The object of the bill is to be relieved from that decree. The grounds of relief relied upon are matters going to show the decree ought never to have been made. The relief prayed is that the case be considered upon the facts presented as if Wolf *had not been* cast in the suit, and as if *no decree* had been pronounced against him, and that relief be granted *now,* to the same extent and with the like effect, as if neither of those facts *had transpired.* Whatever other answer there may be to the application for the relief, it is certainly none to say the Supreme Court has rendered the decree.

VII

One other question remains, which, though not raised on the other side, is always presented, namely, the jurisdiction of the court to grant the relief prayed.

As appears by the statement of the case, the Appellants are citizens of Tennessee, and the Appellees of Ohio, and the cause was removed to the Circuit Court of the United States from the State Court of Chancery, under the act of Congress of 3d March, 1875, 18 Statutes at large, p. 470, sec. 2. And inasmuch as no objection has been taken to the form of the removal, I shall assume that none exists, or that any existing has been waived. The only possible objection to the jurisdiction that I can imagine is, that the relief prayed necessitates the granting of a perpetual injunction by a Court of the United States, staying proceedings in a court of a State.

Revised Statutes U. S., sec. 720.

The exception to the prohibition in the section just referred to is of "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This case is for the purpose of securing to a bankrupt the rights conferred upon him by secs. 5106 and 5119 of the Revised Statutes of the United States, secs. 21 and 34 of the Bankrupt Act, and I confidently insist is a case where the injunction is authorized by a law relating to proceedings in bankruptcy; and so comes directly within the exception.

In Re Miller, 6 Bissell, 30.

In Re Whipple, 6 Bissell, 513.

But suppose I am mistaken in the position just taken, then I insist that the act of Congress of 3d of March, 1875, gives the right to remove any suit whatever upon the conditions it states, without exception as to the character of the case, or the relief it may require, or the form or mode of granting that relief; and that when a cause removed under the act is once in the Circuit Court of the United States, that court or this court may make any decree proper in the case, even though such decree involves the granting of an injunction staying proceedings in a court of a State.

Section 720 of the Revised Statutes is to be regarded as repealed so far it affects suits removed from State courts to Federal courts under the act of 3d of March, 1875, or, else, is to be so construed as not to apply to such suits. Watson vs. Bondurant, 2 Woods C. C., 166. Section 4 of the act of the 3d of March, 1875, seems to proceed on this theory, as it provides for injunctions granted by the State court before removal, remaining in force until dissolved or modified by the court to which the suit is removed. This certainly includes the power to continue the injunctions temporarily, or make them perpetual at the end of the suit, without exception as to the object or effect of the injunctions.

In Railroad Company vs. Whitton, 13 Wallace, 270, 288, the court announced that: "The judicial power of the United States extends by the Constitution to controversies between citizens of the different States, as well as to cases arising under the Constitution, treaties and laws of the United States; and the manner and conditions upon which that power shall be exercised, except as

the original or appellate character of the jurisdiction is specially designated in the Constitution, *are mere matters of legislative discretion.*"

And see The Moses Taylor, 4 Wallace, 429.
Johnson vs. Monell, 1 Woolworth, 390.
Insurance Company vs. Morse, 20 Wallace, 445, 453-455.

The cases of French vs. Hay, 22 Wallace, 250, and Gaines vs. Fuentes, 92 U. S. (2 Otto), 10, are almost directly in point here. Each case had been removed from a State court, and in each the question was whether the Federal courts had jurisdiction to vacate or perpetually enjoin a judgment or decree of a State court. This court sustained the jurisdiction in each case.

The case of Watson vs. Bondurant, 2 Woods C. C., 166, is a very similar case, where the jurisdiction was sustained.

And see Insurance Co. vs. Dunn, 19 Wallace, 214.
French vs. Hay, 22 Wallace, 238.
Watson vs. Jones, 13 Wallace, 679.
Hatch vs. Breston, 1 Bissell, 19.
Fisk vs. U. P. R.R. Co., 10 Blatchford, 518.

The principle now invoked was applied in cases removed from State to Federal courts under Section 12 of the Judiciary Act of 1789. Thus although Section 11 of the Judiciary Act declared that "no civil suit should be brought before either the District or Circuit Courts of the United States against an inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant, or in which he should be found at the time of serving the writ," the courts held the provision had no application to a cause removed from a State court to a Federal court under Sec. 12, or a case originating out of a case of which the Federal court already had jurisdiction.

Jones vs. Andrews, 10 Wallace, 327.
Toland vs. Sprague, 12 Peters, 300, 329–330.
Sayles vs. Northwestern Insurance Co., 2 Curtis, C. C., 212.
Barney vs. The Globe Bank, 2 American Law Register (N. S.), pp. 221, 225–227.
Blivens vs. N. E. Screw Co., 3 Blatchford, C. C., 111.

Warner vs. P. R.R. Co., 13 Blatchford, 230. This last case arose under the act of 3d March, 1875.

And again, Section 11 of the Judiciary Act provided that no Circuit or District Court of the United States should have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of any assignee, unless a suit might have been prosecuted in such court to recover said contents if no assignment had been made, except in cases of foreign bills of exchange.

In Bushnell vs. Kennedy, 9 Wallace, 387, 393–394, the court decided that the restriction in Section 11 had no effect upon suits by assignees removed from State to Federal courts under Sec. 12.

Lexington vs. Butler, 14 Wallace, 282, is to the same effect.

The court has said generally that after the removal the case stands in the Federal Court as it stood in the Court of the State, and the Federal Court is clothed with the powers of the State Court, and all rights acquired by and and all defenses allowed under the State laws are to be recognized in the Federal Court.

Thompson vs. Railroad Company, 6 Wallace, 134, 138–139.
Breedlove vs. Nicolet, 7 Peters, 413.
Akerly vs. Vilas, 3 Bissell, 332, 337–340.
Lamar vs. Dana, 10 Blatchford, 34, 38–39.
Pullan vs. C. & C. R.R. Co., 5 Bissell, 237, 244.

WM. M. RANDOLPH,
Of Counsel for Appellants.

In Supreme Court of United States.

M. WOLF, ET. ALS.

vs.

LOUIS STIX, ET. ALS.

No. 810.

BRIEF OF HENRY CRAFT, FOR APPELLANTS.

Tracy & Co., Printers, 325 Second St., Memphis

In Supreme Court of United States.

M. WOLF, ET. ALS.
vs.
LOUIS STIX, ET. ALS. } *No. 810.*

BRIEF OF HENRY CRAFT, FOR APPELLANTS.

Unless Mr. Wolf can in this proceeding plead his discharge in bankruptcy, it is evident that he cannot do so at all. The decree of the Chancery Court was in his favor, and was prior in date to the filing of his petition in bankruptcy. The date of this decree was December 13, 1872. The petition was filed January 5, 1874. The complainants in the chancery suit prosecuted an appeal to the Supreme Court of the State, and not until the 28th of April 1877 was the cause heard in that court. Wolf's discharge was granted March 28th, 1874, pending the appeal. For reasons shown in the record he did not attempt to plead his discharge in the Supreme Court until after the decree of that court had been rendered. If he had attempted to plead it in that court at an earlier day he would not have been allowed to do so because it is the settled practice of that court not to receive such a plea.

Ward vs. Tunstall, 2 Baxter, Tenn, 319.

In the case just cited the Supreme Court of Tennessee declare in effect that a discharge granted pending an appeal to that court can only be pleaded in Tennessee, in the mode which is here adopted.

If the discharge can be made available to protect Wolfe from liability on the replevin bond, it will be conceded that it will be equally available to protect the complainants, Lowenstein and Helman as the surities in that bond. Sec. 5118, Revised Statutes does not apply to such a case. Without doubt it has been correctly said: "A careful perusal of this section will show that it only applies to a surety who contracted to become liable for the payment of the debt, and not for the payment of the judgment which might be entered in a particular action. It clearly contemplates a case where the surety contracts to become liable with the principal for the payment of the debt. Where a discharge is pleaded in the Appelate Court, so that no judgment can be rendered against the defendant, a surety on an appeal bond conditioned to pay such judgment as might be entered in the Appelate Court, is released. As no judgment was rendered against his principal, no liability attached to him."

Odell vs Wooten, 4 Bank. Reg. 183, (38 Ga., 225).

"This clause applies to persons who are liable for the debt of the bankrupt which existed before, and is discharged by the proceedings in bankruptcy. A bond given to dissolve an attachment is not such a debt. It does not become of the nature of a debt until the contingency arises, upon which it is to be made operative, to-wit: a judgment valid against the principal and which he is bound to pay. When a judgment is rendered for the defendant upon a plea of a discharge in bankruptcy, the bond is discharged, not by the proceedings in bankruptcy, but by the determination of the contingency upon which the obligation of the bond is made to depend."

Carpenter vs. Turrell, 100 Mass. 450.

Such is also the ruling of the Supreme Court of Tennessee:
Martin vs. Kilbourn, 1 Cent. L. J., 94.

And of many other courts:
Payne vs. Able, 4 Bank. Reg. 220, 8 Bush, 344.

Then does the discharge operate to release Wolf from liability upon the replevin bond? Sec. 5115, Revised Statutes, prescribes the bond (as did Sec. 32 of the original act) of the dis-

charge and defines its extent. The discharge which Wolf pleads follows this form. It must operate a release from liability upon the replevin bond if that liability was a "debt or claim" provable against his estate, and was not a "debt excepted from the operation of a discharge in bankruptcy."

Carpenter vs. Turrell, *supra*, was an adjudication upon an attachment bond, or bond given by the defendant in an attachment suit to replevy the property attached. The court said: "The obligation of the principal himself is merely collateral to the suit. Until judgment the bond bears a relation to the actual debt not unlike that of a replevin or bail bond, or recognizance with sureties upon appeal. They are incident to the legal proceedings, and follow the result of the suit. If the plaintiff become non-suit, the debt would not be discharged but the bond would be."

The debt upon which the attachment was sued out by Louis Stix & Co. was a debt due from Marks, Pump & Co. It is not claimed that M. Wolf was in any way the debtor of the said Louis Stix & Co., or in any way bound to them for the debt of Marks, Pump & Co. The attachment was levied upon certain property in the possession of M. Wolf, but levied upon as the property of Marks, Pump & Co. Suppose Marks & Co. had given a replevy bond under the statute of Tennessee for this property, and M. Wolf, E. Lowenstein and L. Helman had become their sureties in the replevy bond. The relation of Wolf, Lowenstein and Helman would have been precisely the same toward the debt due to Louis Stix & Co. as it is in the existing state of the case. Then the discharge in bankruptcy of Marks, Pump & Co. would have released them from the debt, and no judgment could have been rendered against them in the attachment suit; and because they were released, no judgment could have been rendered against Wolf, Lowenstein and Helman as sureties in their replevy bond. An attempt to hold no sureties liable would have been just the case of Carpenter vs. Turrell. There it was insisted that the bond took the place of the attachment, and that its lien operated like the attachment lien, and like it, was preserved by the terms of the Bankrupt Law. But it was held by the court that the attachment was dissolved and wholly displaced by the

giving of the bond; that the bond was a new collateral undertaking by the attachment debtor to become operative only in case of judgment against him for the debt sued on; that by the discharge in bankruptcy he was protected from judgment upon that debt, and that, as to principal and sureties, "the bond is discharged, not by the proceedings in bankruptcy, but by the determination of the contingency upon which the obligation of the bond is made to depend."

But the existing case is, that M. Wolf was made a defendant to the attachment bill, along with Marks, Pump & Co., and is charged with holding the property of the debtors under a fraudulent conveyance; which is void as to the creditors, and the property so held is attached and taken from him. The statute of Tennessee authorized him to give a replevin bond, and upon his giving it, the attachment was dissolved, and the property restored to his possession. Had he not so replevied it, the property or its proceeds would have remained in the custody of the court to await the termination of the attachment suit In that case there would have been between Mr. Wolf and Louis Stix & Co. no privity, and no element of contract whatever. The proceedings as to him would have been strictly *in rem* against the property without any personal liability whatever.

He did not maintain this position, however, but chose to replevy the property. He did this by entering into a contract with Louis Stix & Co., which contract is contained in the replevin bond in which Lowenstein & Helman became his sureties. (Record, p. 30.) This bond recites the attachment suit, the levy upon the property as the property of Marks, Pump & Co., the claim of ownership interposed by Wolf, the value of the property and the purpose of the bond The condition of it is that if Wolf "shall be cast in the suit," and the property shall be found subject to the debt of Marks, Pump & Co., and Wolf, upon the order of the court, shall pay Louis Stix & Co. the agreed value of the property, with interest, the bond shall be void, otherwise not. Secs. 5067, 5068 would seem to fully embrace the claim upon this contract among "provable" claims. "All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by

him may be proved." Sec. 5067. By the succeeding clause it is provided that the fact that the damages in such cases are unliquidated shall not prevent the proving. Here, by contract the damages are distinctly liquidated. To the extent of $10,000 and interest, Wolf agrees to pay the debt of Marks, Pump & Co. as damages for the retention and withholding of their property, upon the contingency (see 5068) that the property so withheld and retained shall be found subject to that debt. The condition is not for the *return* of the property, but to pay the liquidated sum specified. The uncertainty or contingency is solely as to the decision of the court upon the question of fact, whether the property was subject to the attachment, and liable thereunder to the satisfaction of the debt of Marks, Pump & Co. In other words, the contingency is solely as to whether Louis Stix & Co. shall recover judgment against him. If the judgment shall be recovered, the amount of it is thus definitely fixed by contract.

Suppose the bond in the case of U. S. vs. Rob Roy, 13 Bankp. Reg., 235 (1 Woods, 42), had thus stipulated for the amount of the judgment against the claimant if one should be recovered, and also stipulated for the payment of that amount upon the sole contingency that the court should find the existence of the unlawful acts charged, would not the claim have been provable? We respectfully submit that it was provable as it stood, and that, as the United States could not be prejudiced by the discharge, it was not necessary to decide that point. The case is not in accord with the decisions of other courts, but, if it be authority, it does not meet the facts of this case. "The phrase 'contingent debt' means not demands whose existence depends upon a contingency, but existing demands upon which the cause of action depends upon a contingency."

Mills vs Auriol (note), 1 Smith's Lea. Ca., (7 Am. Ed.), 1250.
French vs. Morse, 68 Mass., 111.
Woodward vs. Herbert, 24 Maine, 358.
Riggin vs. Magwire, 15 Wall., 549.
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But it is insisted that the liability of Wolf upon this bond, even

giving of the bond; that the bond was a new collateral undertaking by the attachment debtor to become operative only in case of judgment against him for the debt sued on; that by the discharge in bankruptcy he was protected from judgment upon that debt, and that, as to principal and sureties, "the bond is discharged, not by the proceedings in bankruptcy, but by the determination of the contingency upon which the obligation of the bond is made to depend."

But the existing case is, that M. Wolf was made a defendant to the attachment bill, along with Marks, Pump & Co., and is charged with holding the property of the debtors under a fraudulent conveyance; which is void as to the creditors, and the property so held is attached and taken from him. The statute of Tennessee authorized him to give a replevin bond, and upon his giving it, the attachment was dissolved, and the property restored to his possession. Had he not so replevied it, the property or its proceeds would have remained in the custody of the court to await the termination of the attachment suit In that case there would have been between Mr. Wolf and Louis Stix & Co. no privity, and no element of contract whatever. The proceedings as to him would have been strictly *in rem* against the property without any personal liability whatever.

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But it is insisted that the liability of Wolf upon this bond, even

if provable, is "excepted from the operation of a discharge in bankruptcy" under sec. 5117 Revised Statutes (old sec. 33) because, it is insisted, that it is a "debt created by the fraud, &c., of the bankrupt." "Debts *and claims*" are mentioned in sec. 5115 as provable, and as affected by the discharge, but the excepting clause is only as to "*debts*" both in sec. 5115 and 5117. The effort has been made herein to show that M. Wolf, the bankrupt, did not owe Louis Stix & Co. any "debt," either created by fraud or otherwise. They charged him with a fraudulent holding of their debtors' property, and attached that property in his hands. His bond dissolved that attachment, and constituted a contract between them and him as aforesaid. In U. S. vs. Rob Roy, supra, Bradley, Circuit Justice, said: "Now the appearance of the claimant in court, and his bonding the property, are the transactions on which the present claim is based. They cannot be regarded as fraudulent. Every person is entitled to come into the courts, and prosecute and defend his suits in the ordinary way."

The fraud contemplated by the statute is "actual," not constructive, nor implied.

Neal vs. Clark, 5 Otto, 704.

The liability of Wolf to Louis Stix & Co., if any, does not grow in any way—was not created—by Wolf's fraudulent purchase of the goods attached. They were attached, and in the custody of the law, notwithstanding that fraud, just as fully as if they had been found in possession of Marks, Pump & Co. Under the authority and with the sanction of the law, Wolf received these goods back—took them to his own use—upon a contract made with Louis Stix & Co. The debt, if it can be called a debt, was created by their contract. "If the record shows that the debt was created by contract, the plaintiff cannot, when a discharge is pleaded in bar to the judgment, be allowed to show that the debt sought to be collected was created by fraud."

Palmer vs. Preston, 45 Vermont, 154.
Sherman vs. Strauss, 10 Bank Reg., 300 (52 N. Y., 404.)
Brown vs. Broach, 52 Miss., 536.
Fowler vs. Treadwell, 24 Maine, 377.
Jones vs. Knox, 46 Alabama, 53.

Under the other head of excepted debts, in Section 5117, viz.,

"fiduciary," it has been held—"If the guardian gives his note under seal to the ward's husband, in settlement of his account, and receives a release from them, he is not liable thereon in a fiduciary capacity."

Coleman vs. Davis, 45 Georgia, 489.

So here the fraudulent conveyance under which Mr. Wolf held the property when it was attached, has no connection with the bond upon which it is now sought to hold him liable.

HENRY CRAFT,
Of Counsel for Appellants.

In the Supreme Court of the United States.

NUMBER 810.

M. WOLF, ELIAS LOWENSTEIN and LEON HELMAN, Appellants,

—VS.—

LOUIS STIX, J. L. SWARTZ, N. STIX and HENRY KUPPER, as LOUIS STIX & CO.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

BRIEF

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Gantt & Patterson —AND— Josiah Patterson.

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Appeal from the Circuit Court of the United States for the Western District of Tennessee.

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STATEMENT OF THE CASE.

On the 8th of December, 1866, Louis Stix, J. L. Swartz, Nathan Stix, and Henry Kupper, composing the firm of Louis Stix & Co., in their own behalf, and for the use of Rinskoff Bros. & Co., filed their original attachment bill, in the Chancery Court at Memphis, Tenn., against David Marks, Simon Pump, Jacob Marks, and Isaac D. Marks,

composing the firm known as Marks, Pump & Co., of Memphis, and S. Pump & Co. of Columbus, Ga., and also against the complainant, M. Wolf.

On the 12th of December, 1866, they filed an amended bill, in said cause, against the same parties, and also against G. Kline.

These bills alleged that the said debtor firms owed Louis Stix & Co., in their own right, and for the use of Rinskoff Bros. & Co., about $18,000.

That up to November 30th, 1866, they were doing business as merchants at Memphis and Columbus, and professing ability to pay all their debts.

That on the 30th of November, 1866, said debtor firms made a pretended sale to complainant, M. Wolf, of all their goods and fixtures, as well at Memphis, as at Columbus. That said Wolf gave nothing whatever for said stocks of goods and fixtures, which were worth from twenty-five to thirty thousand dollars. That the transaction was a fraudulent one, and the evidence of the fraud was apparent on its face.

That said Louis Stix & Co. could not get to see any member of the said debtor firms, who seemed to be as completely withdrawn from business, as if they had never been merchants, and business men. That they retired, *apparently*, without paying a dollar of their large liability, expecting, as said Louis Stix & Co. believed, to carry on their business in the name of another, leaving their debts wholly unpaid.

That said M. Wolf was related to one of the members of the debtor firms, and understood their business.

That the pretended sale was made to hinder, delay and defraud creditors.

There was prayer for an attachment, to attach the goods at Memphis, to satisfy the debts of said creditor complain-

ants, and also anything, that might be due from said M. Wolf on account.

There was alternative prayer that, if mistaken as to the character of the sale, and it was *bona fide*, that whatever might be due from the other defendants, to said debtor firms, be subjected to the demands of the complainants.

There was also prayer for general relief.

See Record, pp. 24, 25, 26, 27, 28, 29.

The Memphis stock of goods and fixtures were attached on the 8th of December, 1866, the same being at the time in the possession of defendant, M. Wolf.

In order to ascertain the value of said goods, and to enable said M. Wolf to replevy them, under the laws of Tennessee, a reference was directed to the Clerk and Master, who took proof and reported on the 7th of December, 1866, that the Memphis stock and fixtures were worth $10,000.

See Record, p. 30.

Said M. Wolf and his co-complainants, Elias Lowenstein and L. Helman, entered into bond, for the replevy of said goods, in the words and figures following:

"We, M. Wolf, as principal, and Elias Lowenstein and Leon Helman, as sureties, hereby bind ourselves unto Louis Stix & Co. in the sum of twenty thousand dollars.

"The condition of the above bond is that, whereas, in the suit now pending in the Chancery Court at Memphis, in favor of said Louis Stix & Co. and against Marks, Pump & Co., and in which said Wolf is joined, as defendant, an attachment has been issued against said Marks, Pump & Co., for $18,699\frac{54}{100}$, besides interest and costs, and has been levied upon a stock of goods and other property, as the property of said Marks, Pump & Co., which were in the possession of said M. Wolf, and which were and are

claimed by him as his property; and this bond is given by him for the purpose of replevying said stock of goods and other property attached, being, altogether, as it is agreed by the parties, of the value of ten thousand ($10,000) dollars. Now, in the event said M. Wolf shall be cast in said suit, and said stock of goods and other property shall be found and decreed by the Court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of complainants against Marks, Pump & Co., then and in that event, should said Wolf pay to complainants, as the Court may order and direct, the said sum of $10,000, the value of said stock of goods and other property, with interest thereon from this date, this bond shall be void, otherwise to remain in full force and effect.

"Witness, our hands and seals, this —— day of December, 1866.

"M. WOLF. [L S]
"ELIAS LOWENSTEIN. [L S]
"L. HELMAN." [L S]

See Record, pp. 30, 31.

(This bond was given in accordance with the Tennessee practice. *See Code, Secs. 3509, 3514.*)

Defendants, M. Wolf and M. H. Wolf, answered, denying the fraud.

See Record, pp. 31 to 35.

Much proof was taken, on both sides, in said cause on the subject of the alleged fraudulent conveyance by Marks, Pump & Co. to M. Wolf.

See Stipulation of Counsel, Record, p. 45.

The inferior Court decided that the proof was insufficient to show that M. Wolf participated in the fraud, and Marks, Pump & Co., having been discharged as bankrupts, without assets, and pleading their bankruptcy in the inferior Court,

no decree was rendered against them on that account, and the bill was dismissed, without relief as to all the parties.

See Stipulation of Counsel, Record, pp. 44, 45; also, p. 36.

Louis Stix & Co. appealed from this decree, which was rendered in 1872, to the Supreme Court of the State.

See Record, p. 37.

After this appeal was taken, the complainant, M. Wolf, was discharged in voluntary bankruptcy.

See Record, p. 73.

Owing to the crowded state of the Supreme Court docket, the cause was not heard until the April Term, 1877. The decree of the inferior Court was reversed by the Supreme Court. The judgment and decree of the Supreme Court is in the words and figures following, to wit:

"This cause was heard upon the transcript of the Record from the First Chancery Court of Shelby County, and after argument by counsel, and full consideration by the Court, this Court is of the opinion that there is manifest error therein, and doth therefore order, adjudge and decree that the decree of said Chancery Court be reversed, vacated and annulled; and the Court being further of opinion that the pretended sale of the stock of goods, fixtures, &c., referred to in complainants' bill, made by defendants Marks, Pump & Co., to defendant, M. Wolf, was intended to hinder, delay and defraud their creditors, and was, and is fraudulent and void as to the claims of the complainants; and it appearing from simple calculation, that the said defendants, Marks, Pump & Co., are indebted to the complainants Louis Stix & Co., in their own right, principal and interest to this date, the sum of $22,480.68, and that the indebtedness of said Marks, Pump & Co., to Rinskoff Bros. & Co., for whose use the said complainants Louis Stix & Co. filed this bill, amounts principal and interest, at this date, to the sum of $7,671.88; it is therefore ordered, adjudged and decreed

by the Court, that said complainants Louis Stix & Co., in their own right, recover of said Marks, Pump & Co., said sum of $22,480.68, and that said complainants Louis Stix & Co., for the use of Rinskoff Bros. & Co., recover of said defendants Marks, Pump & Co., the said further sum of $7,671.88, and also the costs of this cause. And it further appearing to the Court, that the stock of goods, fixtures, &c., so fraudulently attempted to be sold to defendant M. Wolf, and which were attached in this cause, were by said M. Wolf, on the 24th day of December, 1866, replevied and taken possession of under a certain bond, executed and filed in this cause, on said day, in the sum of $20,000, by said M. Wolf, as principal, with Elias Lowenstein and L. Helman, as sureties, conditioned in the event that said stock of goods, fixtures, &c., should be decreed to be subject to said attachment, and liable thereunder to the satisfaction of the debts of the complainants against Marks, Pump & Co., for the payment of the sum of $10,000, the agreed cash value of said goods, fixtures, &c., with interest thereon from the said 24th day of December, 1866, the date of said bond; and this Court being of opinion, as before recited, that said sale was fraudulent and void, and that said stock of goods, fixtures, &c., so attached and replevied, were subject to said attachment, and liable for complainants' said debt. And it further appearing from simple calculation that said sum of $10,000 with interest from the date of said bond, December 24th, 1866, to the present time, amounts to the sum of $16,200; It is therefore further ordered, adjudged and decreed by the Court, that said fraudulent sale be, and is hereby set aside, and for naught held, as to complainants' said debts herein against defendants Marks, Pump & Co., and that the complainants Louis Stix & Co., in their own right, and also for the use of Rinskoff Bros. & Co., do have and recover of and from the defendant M. Wolf, and Elias Lowenstein and L. Helman, his sureties on the aforesaid replevin bond, the said sum of $16,200, the value of the property replevied, and interest thereon to this date, for which execution may issue.

And it further appearing from the Record that the said defendants, Marks, Pump & Co., have been since the filing of complainants' bill, discharged in bankruptcy, no execution is awarded against them for complainants' recoveries herein; and the cost of this cause, and the Court below, will be paid out of the said recovery of $16,200, against defendant M. Wolf and his aforesaid sureties on replevin bond."

See Record, pp. 37, 38.

After the cause was heard and determined by the Supreme Court of the State, complainant, M. Wolf, for the first time, brought to the attention of the Court, by petition, the fact that he had been discharged in bankruptcy, and claimed that such discharge should have the effect of releasing him, and his sureties, from liability.

The Supreme Court held, that according to its jurisdiction and practice, it could not take notice of the question thus presented, and dismissed the petition of said Wolf.

Insisting there was a Federal question involved, said Wolf, and his sureties, removed the cause, by writ of error, to the Supreme Court of the United States, which Court dismissed the writ of error, because no Federal question was involved.

6 Otto R., p. 541.

On the 26th of May, 1877, the bill, in this cause, was filed.

See Record, p. 10.

On the 1st of October, 1877, the cause was removed, by the complainants, to the Circuit Court of the United States at Memphis.

For the answer of Louis Stix & Co. to the bill in this cause,

See Record, p. 20–34.

For the exhibits to said answer,

See Record, pp. 20, 24, 29, 30, 31, 33, 36, 37.

For stipulation of counsel, as to evidence,

See Record, pp. 44, 45.

The cause was heard by Hon. John Baxter, Circuit Judge, upon bill, answer, exhibits, replication and proof. He denied relief to complainants, and they appealed to this Court.

BRIEF.

Two questions, for decision, are presented by the Record:

1. Is the liability of M. Wolf released by his discharge in bankruptcy?

2. If he is discharged, does that also release his sureties?

I.

Is M. Wolf discharged?

His liability originated in *fraud, in fact.* This conclusively appears from the allegations and charges of the original and amended bills, and the decree of the Supreme Court of the State, which adjudges the liability of said Wolf.

The inquiry then is, does a discharge, in bankruptcy, release the bankrupt from such a liability?

The solution of this question depends on the proper construction of the 33d section of the Bankrupt Law of 1867, which declares that,

"No debt created by fraud, or embezzlement of the bankrupt, or by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this Act."

The opinion of this Court, in Neal vs. Clark, 5 Otto R., p. 704, construes said section, holding that where the liability springs from circumstances, making only a constructive fraud, without intentional wrong, that a discharge, in bankruptcy, releases it. On the contrary, that where the liability grows out of positive fraud, or fraud in fact, which involves bad faith, and conscious wrong, that the bankrupt is still bound. The object of the law was to relieve the honest citizen from hopeless insolvency; but it was not intended to relieve those who were guilty of moral turpitude, or intentional wrong.

5 Otto R., p. 709.

Neal and the sureties, in the 5 Otto cases, were exonerated, because Neal was guilty only of constructive fraud, without intentional wrong.

Complainant, Wolf, and his sureties, must be held, on the authority of that case, as remaining liable, notwithstanding Wolf's discharge, in bankruptcy, because Wolf was guilty of positive fraud, and intentional wrong.

But it is contended that the judgment eliminates the wrong and purges the case of the taint of fraud, and, therefore, Wolf is released. The law is just the reverse. The Court will look back to the "root of the matter," and see if it had its origin in positive fraud.

Bump. on Bankruptcy, 10 Ed., pp. 742, 743;
6 Blatch., C. C. R., p. 253;
1 Bank. Reg., 307; 2 Id., 108; 4 Id., 15–63; 13 Id., 52.

These authorities also show that giving a delivery bond does not vary the case. The Court will go back to the origin of the liability.

The assumption that the liability rests wholly on the replevin bond, as matter of contract, is unfounded. The bond is a mere step in the cause—an incident to it. It got the property released, and stands in the shoes of the property, and is the substitute merely for the fraudulent transaction arraigned by the bill. If the property is liable, and the party is liable, and the bond stands for the party and the property, then the obligors on the bond are liable.

It is urged that the word debt, used in section 33 of the Bankrupt Law of 1867, means a liability which arises *ex contractu.*

The authorities are all against this view.

Bump. on Bankruptcy, 10 Ed., p. 728, notes;
12 Bank. Reg., 498;
10 Rhode I. R., p. 261.

The case of Neal v. Clark, 5 Otto, 704, is necessarily against it.

See also, further, in this connection,

52 New Hamp. R., p. 301;
78 Ill. R., p. 207;
13 Bank. Reg., p. 52;
50 Ala. R., p. 270.

It is argued that the relation of debtor and creditor can not exist between these parties, because Wolf's act is shown to be one of positive fraud. He is guilty, as the argument assumes, of positive wrong, and of an act involving bad faith, and dishonesty, and, therefore, the law cannot consider him a debtor, within the 33d section of the Bankrupt Law.

It is a cherished doctrine of the law never to let one thus offending escape under cover of the wrong he has done. He shall take no benefit from his wrong. He will

be treated as a trustee, for the injured party, if necessary.

Bump. on F. Con., pp. 588, 589, 590, 591;
2 Mason C. C. R., pp. 252–298, 299;
2 H. and G. (Md.) R., pp. 191–224;
2 Bland R., p. 56;
2 Wharton's Ev., Section 1038, and notes.

II.

Assuming that Wolf's discharge releases him, does it follow, that the sureties are also released?

This depends upon the conditions of the bond, which are in these words:

"Now, in the event the said Wolf shall be cast in said suit, and said stock of goods and other property shall be found and decreed by the Court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of complainants against Marks, Pump & Co., then, and in that event, should said Wolf pay to complainants, as the Court may order and direct, the said sum of $10,000, the value of said stock of goods and other property, with interest thereon from this date, this bond will be void; otherwise, to remain in full force and effect."

All the conditions have happened upon which the liability of the sureties depends.

1. Said Wolf has been cast in the suit.

2. He has failed to pay the $10,000 and interest, as the Court has ordered and directed.

3. The goods and other property have been found and decreed subject to the attachment, and liable thereunder to the satisfaction of the debts of complainants (Louis Stix & Co.) against Marks, Pump & Co.

Suppose Wolf's discharge is effectual as to him, does it *relieve the goods?* His release does not settle that they are

not still liable. The attachment created a specific lien upon the goods for complainants' benefit. The bond stands for the goods. If the goods had not been replevied, the discharge of Wolf, if effectual, to work his release, would not have set the goods at liberty.

Having become liable by a breach of the bond, with judgment against them in consequence, a court of equity will not relieve against the liability thus fixed, without requiring the sureties to account for the value of the goods, with interest. They must do equity. The question would be otherwise, if no judgment had gone against them, and nothing, but the mere personal liability of the debtor, were involved. But the property is involved—the property of Marks, Pump & Co.—and, it is the obligation, to answer for this property, that certainly is not discharged, even if said Wolf is discharged, so far as his personal liability for the judgment is concerned.

There is some conflict of authority on the subject when, and, in what cases, the discharge in bankruptcy of the principal, on prosecution bonds, releases the sureties.

It is believed, however, that no well considered case has decided the exact question here presented. There has been no decision of this Court upon the precise point that we are aware of.

Under the conditions of the bond in this case, and the circumstances attending it, the release of the sureties, because a judgment rendered against their principal can not be personally enforced against him, would be a palpable wrong.

GANTT & PATTERSON,
AND
JOSIAH PATTERSON,
Solicitors for Defendants.